IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF OKLAHOMA

IN RE: BROILER CHICKEN GROWER LITIGATION

HAFF POULTRY, INC., et al.,	)
	)
Plaintiffs,	)
	)
-vs-	) No. CIV-17-033-RJS
	)
TYSON FOODS, INC., et al.,	)
	)
Defendants.	)

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE ROBERT J. SHELBY

UNITED STATES DISTRICT JUDGE

APRIL 20, 2018

REPORTED BY: ***BRIAN P. NEIL, RMR-CRR***
United States Court Reporter

A P P E A R A N C E S

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Friday, April 20, 2018

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THE COURT: Good morning, everyone, and welcome back. We'll call our consolidated Case No. 6:17-CV-033. It's In Re: Broiler Chicken Grower Litigation case.

Counsel, I have your names here on a seating chart, but would you kindly make your appearances and reintroduce yourselves?

MR. HARKRIDER: Thank you very much, Your Honor. My name is John Harkrider representing Tyson Foods, and I am here with my partner, Mike Keeley, and my associate, Jonathan Justl. I have the pleasure of having from Tyson legal Jane Duke and Bill Burke sitting behind the bar.

THE COURT: Very good. Welcome to all of you. Thank you.

MR. GORDON: Good morning, Your Honor. Leonard Gordon from the Venable firm for Perdue.

THE COURT: Thank you.

MR. STEWART: Your Honor, Ben Stewart from Bailey Brauer in Dallas on behalf of Pilgrim's, and we have our Oklahoma counsel, Reid Robinson.

MR. ROBINSON: Good morning, Your Honor.

THE COURT: Good morning. Welcome.

MR. ROBINSON: Thank you.

MR. CRAMER: Good Morning, Your Honor. Eric Cramer

from Berger & Montague from Philadelphia for the plaintiffs. I'm here with my partner you met last time, Dan Walker, also from Berger & Montague. And we're happy to have our client here, Mr. Steve Haff, and his wife Robin Haff, from Haff Poultry.

THE COURT: Very good. Thank you.

MS. COOLIDGE: Good morning, Your Honor. Melinda Coolidge from Hausfeld for the plaintiffs as well, and I'm here with my associate, Samantha Derksen.

THE COURT: Great. All right. Well, welcome to all of you --

MR. RIGGS: Your Honor -- excuse me -- David Riggs, interim liaison counsel, with Kris Koepsel of our firm.

MR. LAHMAN: Larry Lahman from Mitchell & DeClerk of Enid, Oklahoma, for the class.

THE COURT: Very good. All right. Well, thank you. Welcome, everyone. That's usually the longest part of the hearing.

All right. Let's take up some housekeeping and then we have a couple of motions on the calendar to take up today. So I'm reminded -- do you all remember Rocky and Bullwinkle? There was -- after commercial breaks, you'd come back to the cartoon and the narrater would say -- it would give you an update about where we've been and when we last saw our heroes they were, you know, on the train tracks tied to the tracks or

something. So I think it's helpful usually to take inventory where we've been.

So we were here together last with our heroes on January 19th for a hearing on a number of motions, and we got as far as the motions to dismiss filed by the Koch and Sanderson Farms defendant groups on the basis of -- well, raising personal jurisdiction issues. We ended up granting those motions and dismissing those groups of defendants. In view of that fact, we hit the pause button to give the plaintiffs an opportunity to evaluate whether they prefer to continue with the remaining claims here with the remaining defendants or dismiss the case and seek relief elsewhere.

In February, the plaintiffs notified us all that they intended to proceed here against the remaining defendants and then mentioned that they intended to file suit in another district, which they have since done, and seek relief from the JPML to consolidate the cases back and then for pretrial proceedings. It appears to me that that process is underway, has been initiated, and I think I saw a notice that there may be a hearing in May. But we'll continue here and we'll continue to address the issues you presented and move forward without waiting.

Of course, I think one of the defendants -- or some of the defendants moved for a stay pending the resolution of the MDL proceedings and we've declined to do that. I think

especially given the age of the case and the importance of the issues and the fact that those defendants had already participated in the briefing on the issues we'll be taking up today, it seemed to me the best course was to proceed and we issued an order to that effect.

So today -- so we deferred initially then -- there's two sets of motions, the defendants' motion to dismiss under Rule 12, invoking Rule 12(b)(2), 12(b)(3), and 12(b)(6). There was more argument devoted to some of that than others and we'll address all of those issues. And then there's a second motion -- it's Perdue's motion -- to compel arbitration with one of the six plaintiffs, Nancy Butler, also seeking to dismiss or to stay the proceedings or the claims.

There's one issue I was hoping to get the benefit of your thoughts about before we get into the merits of the motions, and that is the bankruptcy court order out of the Northern District of Texas relating to Pilgrim's Pride. Mr. Stewart, maybe you can address that.

Am I reading the bankruptcy court's order to suggest that the complaint we have before us is inoperable in that court's view?

MR. STEWART: In terms of Pilgrim's Pride, yes, Your Honor, the plaintiffs are enjoined from proceeding on the current complaint.

THE COURT: Is our microphone on at the podium? Oh,

it is. All right. I just want to make sure the other folks in the courtroom can hear you.

Is that a function of the -- why is that? Is that because of the dates that are alleged to be the operative dates for the conspiracy dating into 2008?

MR. STEWART: I think that is primarily the issue, Your Honor, the alleged conspiracy going back before the effective date of the plan. All of those claims would be barred by the confirmation order. Based on the current complaint, it's unclear -- there are no allegations that Pilgrim's rejoined any conspiracy after that time.

THE COURT: You don't think the allegations in the complaints are, assuming them to be true at this stage of the proceedings, that Pilgrim's has continued to participate in the conspiracy after 2009, including and through the date of the filing of the complaint?

MR. STEWART: I don't, Your Honor. I think that there has to be a specific allegation of rejoining the conspiracy. As the bankruptcy court noted, all contracts, including any agreement to participate in a conspiracy, were rejected at the time of confirmation of the plan and the effective date of the plan. There are no allegations that Pilgrim's has specifically rejoined a conspiracy or engaged in any action that would constitute rejoining a conspiracy after that date.

THE COURT: Well, of course, you can ratify a conspiracy by continuing to participate with knowledge of what your co-conspirators are doing. But these issues haven't been briefed before us, and it's unclear to me that under *Stern v. Marshall* and the like that an Article I judge can or -- I mean, I understand the bankruptcy bar and I understand the operation of the bankruptcy, the discharge, the availability of claims, and the bar of claims and the like.

But you think the effect of that bankruptcy order is to say that this complaint is dismissed or what?

MR. STEWART: No, Your Honor, I don't. I don't think that that complaint or the bankruptcy court's order has any direct effect on Your Honor. I think it enjoins the plaintiffs from proceeding against Pilgrim's based on this complaint. It's a fine distinction. But I think that the bankruptcy court does have jurisdiction over the plaintiffs to order that they cannot proceed based on this complaint, even if he doesn't have jurisdiction to tell Your Honor what to do.

THE COURT: And what happens if I see it differently, if I think that the allegations in the complaint give rise to an inference at this stage of the proceeding that Pilgrim's Pride continued to participate in the conspiracy after the bar date?

MR. STEWART: At that point then, Your Honor, I think the plaintiffs would have to -- they'd have to decide

what they're going to do. Are they going to replead against Pilgrim's based on your ruling, or are they going to abide by the bankruptcy court's injunction and not proceed against Pilgrim's?

THE COURT: And you think it's a -- I know that it operates as a bar to a claim. But where the claim covers a period of time, is there a difference in law in your mind about whether the claim is barred or the recovery period for the claim? You say it's an ongoing violation and I'm not saying that. We're just talking hypothetically to understand the application of the order.

Suppose it's an ongoing violation. Does it not just operate as a bar to the damage period that would be available against Pilgrim's?

MR. STEWART: Under these circumstances, I don't think it would, Your Honor, because the claim arises before the effective date of the plan. And so I think it's a bar to the claim itself until we have an operable pleading that says the claim doesn't begin until after that date.

THE COURT: Do you think that -- how do you think that operates here? Do you think that anybody needs to -- in this case needs to seek any relief from this court? Do you think a motion is appropriate? Do you think Pilgrim's Pride is just out of the case? Is there a reason that you're here today?

MR. STEWART: Well, we're here because we're still technically in the case, Your Honor. Even though the plaintiffs are barred from proceeding on their present complaint, they have the opportunity to possibly amend that complaint and we haven't been effectively dismissed from this action. So we're here at your pleasure.

THE COURT: All right. Thank you, Mr. Stewart.

MR. STEWART: Thank you, Your Honor.

THE COURT: Ms. Coolidge.

MS. COOLIDGE: Good morning, Your Honor. Just a few comments on the -- I think if you look at the full transcript, the judge in the bankruptcy court agreed with us, that there was clearly an ongoing violation as to the information exchange.

THE COURT: As it was pled?

MS. COOLIDGE: As it was pled, correct. And it seemed to be an issue of semantics and the fact that we had said 2008, that things started in 2008, or at least 2008, that the bankruptcy court didn't like. We have no problem with rephrasing claims in our complaint so that it doesn't implicate Pilgrim's bankruptcy. And so our thought was after the hearing today, we'd have a sense of what a new complaint should look like and we can make it fit with the bankruptcy court's order.

THE COURT: This is my primary concern if we get this far -- and I'm not prejudging the outcome of the motions

we're going to argue today. I have some preliminary thoughts about the motions that I'll share with you and then we'll have argument, but I'm here, as I always say, with an open heart and an open mind. If the motions to dismiss are granted, then it's a moot question; but if the motion to dismiss is not granted, then we're proceeding.

What I just hate to see is for a -- we're a year into the case and we're not yet through the pleading stage, and that's not unusual but I'm mindful of that, another round of amendments. And maybe what you're saying -- maybe what both of you are saying is that just where we are is that we'd have to seek further amendment and then I guess we don't yet have answers. So as long as those amendments didn't raise new issues that would trigger more Rule 12 motions, then I think we're fine. Otherwise, at some point -- I'm just wondering if there's another way to remedy the issue.

You think the pleading itself -- well, that judge's view -- that court's view was that the pleading itself implicates the bar and so you can't proceed as to Pilgrim's Pride on this complaint. That's the ruling and I guess the law -- it's not the law of the case but it's -- or maybe it is.

MS. COOLIDGE: I think that Your Honor could disagree with that and we're certainly open to hearing further thoughts on it. Our thought was whatever semantic changes we make to the complaint to fit within this order shouldn't

trigger additional motions to dismiss. Of course, we don't have control over that as the plaintiffs but we would hope that the complaints would be answered.

THE COURT: All right. Well, I guess one step at a time is a good way to proceed. Thank you both for your thoughts about that.

All right. I think the thing that makes most sense probably is to first take up the Rule 12 motion. We've read, of course, and now twice prepared for argument on the Rule 12 motion. I think I understand the arguments you've all advanced in your papers. Once again, let me thank you for the quality of your briefing. It's refreshing and it's a joy to read your papers.

Keeping with my practice, I think it's -- my preference is to give you a sense of my leaning and then that will help us, I hope, focus and sharpen our argument and presentation today. My reaction coming to the bench -- but, again, without having made a formal decision about it -- is that applying Rule 12 and *Iqbal* and *Twombly*, but mindful of the additional requirements when we're talking about pleading a conspiracy and an antitrust case, my sense of it is that the "no poach" agreement that's alleged in the complaint, if it were evaluated standing alone, fails to clear the plausibility hurdle. The information sharing agreement that's alleged in the complaint, in my view, assuming the truth of all the allegations in the

complaints, does seem sufficient. There's argument in the papers about whether those two independent theories or agreements -- I guess it's alleged they're independent agreements -- should be considered collectively or independently. It's not clear to me that it matters.

If it's true -- and the defendants may persuade me today that I'm mistaken -- but if it's true that the information sharing agreement that's alleged in the consolidated complaint is itself sufficient to give rise to an actionable Sherman Act claim, then don't we just stop there at a Rule 12 motion? In this sense of whether the law says I consider the agreements collectively or together, the plaintiffs argue that if there's a synergy between the two they work together. But my practice has been -- my way of thinking about Rule 12 and Rule 56 is that once you have an actionable claim, that's the end of your Rule 12 inquiry and we reserve until Rule 56 the question of splitting parts of claims or defenses. Rule 56, of course, was amended to allow that, to take issue with parts of claims or defenses. I read Rule 12 to be that a claim succeeds or fails.

By way of example, in a breach of contract -- this is an imperfect example -- but in a breach of contract claim where there's a breach of contract in the complaint and it's premised on, say, three separate breaches, suppose one of those breaches is barred for some reason, one of the breach theories is

barred, say the statute of limitations or something, but the other two are actionable. My view has always been, well, then the motion to dismiss is denied; if we're going to start parsing parts of claims, that's Rule 56 stuff, not Rule 12 stuff.

I think as I've thought about it in the context of this case, and mindful of the concerns that we require careful pleading of antitrust claims under the Sherman Act because of the cost and time and expense of litigating these cases, it doesn't seem inconsistent in my mind that we would reserve the question of the "no poach" agreement until after discovery. The additional related discovery would just not be that onerous.

I mean, the alternative is -- and maybe I'm moving well beyond the papers here -- but the alternative seems to be striking an alternative theory in a complaint and I guess, what, language in a complaint? It seems premature to me. But with respect to the information sharing agreement, it seems robust and plausible.

Going back to the "no poach" agreement, and maybe in contrast to the "no poach" agreement, I'm pretty heavily persuaded that the facts that are alleged, even if we assume the truth of the facts that are alleged respecting the "no poach" agreement, there aren't any facts there that suggest the existence of an agreement among the integrators to not poach.

There are secondhand statements and even -- let me be clear.

I'm assuming the truth of the hearsay and secondhand statements in the consolidated complaint respecting a "no poach" agreement, but at best it seems to me that they establish -- I'm trying to remember -- is it Peco? Pesco? Sorry. I should have this -- Peco. I think at most it seems to me that there might be a reasonable inference that Peco had an agreement with -- and I'm trying to remember now the integrator --

MR. CRAMER: Tyson.

THE COURT: Tyson. Thank you, Mr. Cramer.

In any event, I just don't -- and it's -- the reasonable inferences to be drawn is not a clear exercise, intellectual exercise. But it doesn't seem to me that the facts set forth in the complaint on "no poach" generate a plausible claim for relief, that there was an independent "no poach" agreement. Some of the facts that are set forth in that part of the complaint seem to me to lend plausibility to the information sharing agreement that's alleged, but on balance it seems sufficient to me even if it was just an information sharing agreement that is pled in the complaint.

So that's a starting point. Of course, there are a lot of subarguments that are advanced by the parties, but I wanted to share those preliminary thoughts at least and begin there. I think that the effect of that ruling that -- it's not a

ruling -- but that leaning would be not favorable to the defendants. So let me invite the defendants to maybe first approach the podium and help me understand what it is that I'm misunderstanding.

Mr. Harkrider.

MR. HARKRIDER: Thank you very much, Your Honor. We actually anticipated your leaning so hopefully you'll bear with me.

But I want to start off, if I might, with taking a big step back and looking at really the purpose of the antitrust laws. The antitrust laws were once famously said by Thurgood Marshall to be the Magna Carta of free enterprise, and that's a pretty lofty thing to say and I think it is worth sort of unpacking exactly what that means.

I think what that means is that it sets forth essentially and protects the free enterprise system of this great country and it prohibits certain conduct that almost always harms competition, so-called sort of per se price-fixing agreements. We do not think we have one before you, Your Honor, and we'll go through that.

There's, of course, a --

THE COURT: I don't either. I didn't mention that. But I think it seems to me we really are advancing under a rule of reason.

MR. HARKRIDER: Correct. That's correct.

THE COURT: And I think the plaintiffs, I think, largely -- I don't know if they concede that in their papers. Reading between the lines, I think that's where we are. But go ahead.

MR. HARKRIDER: That's correct, Your Honor. We feel that as well.

There's this other sort of middle category of behavior that may be captured under the rule of reason, and that's where you have certain market conditions and you have certain behavior and certain plausible facts or allegations that make it seem likely that there's an actual harm to competition. It may be that the plaintiffs believe that we have such a case before you; we do not.

What we think we have is actually a third category of conduct, and that third category of conduct is conduct that affirms, may gauge it, that is efficient from their point of view, it drives down costs, which is something that is generally thought of as good for consumers. But it might also drive down the price that people are paying because they're operating more efficiently, and it may also require other firms to make investments, to innovate, in order to participate in the market. Those are things that actually benefit competition, but they may from time to time be things that people on the other side of the market don't like. That's what we think we have.

But we also think that that is essentially fundamentally the foundation of the free enterprise system in this country. Not to say that there are winners and losers, but obviously in any transaction one might say, oh, I want to get paid more; or with respect to any business practice, they might say, I don't want to make an investment in, you know, your specific -- your specific, you know, ventilation system or heating system or things of that nature, which are complained about in the complaint.

And so when you really look at what this case is actually involving, at its core it's involving really two practices that we think are plainly procompetitive. One is that the integrators all have different specifications for their housing with respect to equipment and lighting and ventilation and things of that nature and that the growers have to build their houses to those specifications. The natural consequence of that is that it may make it very difficult to switch, but that's the sort of product differentiation that we think is actually procompetitive.

They don't allege, by the way, that there's an agreement between the integrators to have different specifications, but it is one of the things that may make it difficult to switch, which is one reason you may see low switching, notwithstanding the fact that there may be no agreement whatsoever not to poach, as you suggested as a

leaning in your initial comments.

The second part of what they're complaining about is benchmarking, essentially cost benchmarking, that there's an organization called "Agri Stats" that everyone is participating -- that firms are participating with and getting information from. We believe that benchmarking is procompetitive and we believe the Tenth Circuit has actually reached that result. In *Intracorp*, the Tenth Circuit held that the use of third-party benchmarking services simply reflects, quote/unquote, the legitimate and reasonable concerns to lower cost.

Now --

THE COURT: Won't it depend --

MR. HARKRIDER: Yeah.

THE COURT: Won't it depend on what information is being exchanged and under what circumstances?

MR. HARKRIDER: Sure. I think that that's true. But if you look at *Intracorp*, what you find is that *Intracorp* involves the prices that chiropractors are charging and a rule essentially that this third party, Intracorp, is promulgating that says that insurance companies should not be paying more than 80 percent of what the chiropractors charge. That information is disseminated throughout the industry and I think -- I'm not a hundred percent; I try and be careful on my representations -- but I think one of the allegations or the

results of the case is that that's actually what actually happens in the industry, is that people are -- that the insurance companies actually don't reimburse over the 80 percent. That seems to have a pretty natural tendency at the end of the day that someone who is, you know, charging above the 80th percentile, the 90th percentile, the 95th percentile doesn't get reimbursed. But my basic point is that the -- that the information that is actually at issue in *Intracorp* is chiropractors' prices.

If you look at the *Bristow* case -- I think it's in the Third or Fourth Circuit -- which is helicopters, that's talking about the, I think, future prices, future capacity, which is also very sensitive.

I think it also goes beyond what is the -- and we'll get into greater detail in a moment -- but it goes beyond, as you suggested, if this is not per se, it's under rule of reason. One of the core things that they need to allege in a rule of reason case is, you know, a relevant market. They've defined a relevant product market but the relevant geographic market that they're alleging is a nationwide geographic market.

I'll start citing some cases and I'll go into this when I get beyond sort of the general sort of antitrust view, is that, you know, it's pretty obvious -- and, of course, it held already -- that the market for grower services is actually very, very local. It stands to reason it's pretty difficult to

transport live birds for slaughter, you know, across the country or more than 35 or 40 miles. In fact, there are zero allegations whatsoever in the complaint that credibly suggest that in response to a price increase in Texas, that somebody in Kansas is going to, you know, switch to a different integrator, which is what you would need in order for a nationwide market. In fact, you would probably need someone from California going to New York. There are no allegations with respect to a plausible geographic market.

Now, maybe they're alleging a nationwide market because they're worried about individual facts predominating when they get to the class certification issue. I'm not sure why they're alleging a national market. But the basic point is -- I think it's black-letter law -- that you need to have -- under a rule of reason claim, you need to have a properly defined relevant market which they have not.

THE COURT: The allegation, as I understand it, is that the defendants, together with the co-conspirators, control 98 percent of the market and that market was robust throughout the country, and that the point is the information sharing, the price-controlling portion of the agreement, affects pricing in all those regions, that the conduct is not so localized. That's the growers, of course, with the integrators but that the integrators are coordinating prices and controlling prices and information nationwide.

You think that's insufficient?

MR. HARKRIDER: I think that's plainly insufficient, Your Honor, respectfully. I think that they need to define a relevant geographic market. It may be that there are a thousand relevant geographic markets but they haven't alleged that.

THE COURT: Relevant geographic market for what?

MR. HARKRIDER: For the provision of grower services. They need to allege -- the product market has two dimensions. It has a product part of it and it has a geographic part of it and in both cases the test is the same. It is in response, called a SSNIP test, a small and significant non-transitory increase in price; or in this case, a decrease in price.

THE COURT: Easy for you to say.

MR. HARKRIDER: Easy for me to say. And the question would be, in response to a reduction in compensation, would you switch to an integrator in another part of the country? And there are no allegations whatsoever that that is satisfied.

And so, Your Honor, I respectfully submit that you would actually be making new law and saying that if -- if one is alleging that the conduct is occurring in all parts of the country, that you do not need to actually allege credible facts supporting a relevant geographic market, sort of an exception

to the rule of the geographic market definition.

So going back to sort of this broad overview, you know, the plaintiffs know they can't attack product differentiation and they know they can't attack benchmarking, so what they do is they essentially add these conclusory allegations with respect to both of them. They say, okay, well, we can't attack product differentiation so we'll say that there's an agreement not to poach each other's growers. We can't attack benchmarking so what we'll say is that there's an agreement between the defendants to use a benchmarking service. But they're grafting on these very conclusory statements, and yet there are virtually no facts to suggest that -- of the sort that we would respectfully submit that *Twombly* actually demands to suggest that it is plausible that an information sharing agreement, in fact, exists.

So let's look at what they actually allege with respect to information sharing. So in paragraph 2, they allege that defendants and co-conspirators illegally agreed to share detailed data on grower compensation with one another.

In paragraph 56, they allege that since 2008, and likely earlier, as part of the scheme to artificially suppress grower compensation, defendants and their co-conspirators have agreed to and shared with themselves detailed grower compensation information. Similar conclusory allegations are made with respect to "no poach"; they basically say there's an

agreement not to poach.

But what's effectively missing from that is any additional facts. You don't know who made that agreement. You don't know where that agreement was made. You don't know when that agreement was made. And actually the when is actually quite important because they allege that the agreement started in about 2008, but yet they also allege that prices have been declining since the 1980's. Which means that unlike another case, where you might find that the allegations are plausible because, you know, there was a meeting and then something changed after that meeting -- and there are lots of cases that hold that that might be sufficient -- there's no allegation of like a meeting and agreement to use Agri Stats and that after that meeting either people before didn't use Agri Stats and now they use Agri Stats; or before the agreement, prices -- you know, grower compensation was at one level and then after the agreement grower compensation was at another level. You actually have no details whatsoever to make the allegations plausible other than the naked allegation that there is an actual agreement.

We would suggest that if you look at the actual allegations in the complaint in *Twombly*, the complaint in *Twombly* actually alleges that there was an agreement between the various defendants. In two paragraphs, in paragraph 51 and in paragraph 61, *Twombly* alleges that the defendants,

quote/unquote, agreed not to compete with each other and otherwise allocated customers and markets to each other so there's an actual allegation. So *Twombly* is just not a parallel conduct case; it is a case where there's an actual allegation that there was a conspiracy, just like there's an actual allegation with respect to Agri Stats, but there are no -- there were no additional facts in *Twombly* other than the fact that people weren't going into each other's territories.

In this case, there are no actual facts other than the allegation that they use Agri Stats.

THE COURT: Well, that's just not so, is it? I mean, the allegations in the complaint and under *Twombly*, I'm required, as you know, to consider -- to assume the truth of the well-pled allegations --

MR. HARKRIDER: Sure.

THE COURT: -- but I'm required to evaluate the pleading in its entirety.

Among other things, the plaintiffs say there's other indicia of this agreement, including the fact that high-level executives at the companies routinely move from one company to the other and they do so without restrictions on competition or confidentiality, which is unusual, especially in an industry like this; that the nature and quality of the information that all of the defendants share and receive through Agri Stats is of a quality and type that supports the inference that there is

such an agreement, including contemporaneous cost information They talk about the nature of the market itself and how it's structured as additional evidence to support the effectiveness of an agreement that they allege to be in place here. I mean, there's a handful of other allegations.

But all of that in its entirety, I think, underlies the basic question, which is whether there's a plausible claim alleged. We don't separate it out into constituent pieces; right?

MR. HARKRIDER: Sure. No, I understand that. But I'm respectfully suggesting that with respect to information sharing, there still needs to be allegation that there was an actual agreement between the defendants to use Agri Stats. There's -- there may be allegations that people are using Agri Stats, but are they using it pursuant to an actual agreement?

So let's look at the actual information sharing cases --

THE COURT: The allegation, as I understand it, is that there's an agreement to exchange information for the purpose of allowing the defendants to control prices and it injures competition and that Agri Stats is the vehicle through which the defendants have agreed to do this. I think that's the allegation that's in the complaint and Agri Stats affords that vehicle.

What is missing in the complaint but it seems to me not

essential is -- nor do I know that the plaintiffs would have access to this information at this stage -- Agri Stats -- I understand from the complaint -- and I'm trying to limit myself, I'm trying to be disciplined. Additional information was supplied in the briefing, but if it's not in the complaint, I don't think I should consider it at this stage even if it's helpful to my own understanding.

Agri Stats is a multi-industry entity, right, it doesn't just work in the space, it operates in other spaces? So I assume, but don't know, that the name "Agri Stats" suggests to me that maybe it's more closely related to this industry than others. It's not clear to me why Agri Stats would choose the kind of information that it receives from the defendants and redistributes to the defendants unless it is -- has selected that information -- those categories of information that the defendants request or because that's what the defendants want to aggregate and assimilate and get back.

Is that not a fair inference also from the complaint?

MR. HARKRIDER: I'm not sure it is. So I think if you look at the other information sharing cases that are cited by the plaintiffs, there is a very significant difference between this case and those cases. And so what the -- what they are asking you to do is to essentially go beyond any law that I'm aware of. So I think that there's a fundamental distinction between sort of a vertical arrangement, which is

this vertical arrangement where, you know, Tyson or somebody else uses Agri Stats.

And so think of this as almost hub-and-spoke, and so there's a fundamental difference between a vertical agreement and a horizontal agreement. There are no allegations that we see other than sort of a blanket allegation that there are actual agreements between the defendants. And so just bear with me for a moment as we look at the other cases where courts have allowed information sharing cases to proceed.

If you look at *American Linseed*, in *American Linseed*, which is a Supreme Court case, there was an agreement that they would report to the bureau by pre-paid telegraph all quotations made at variance with things -- with prices above the price list. There was an agreement that no council member shall dispatch changes in his prices as last filed with the bureau with more than one buyer. There was an agreement under penalty of fine to attend a monthly meeting to report upon matters of interest, including the information that was exchanged. There was an agreement that the discount rate would be at one percent, which is essentially a price-fixing agreement, and the survey participants together determined the geographic regions for which the sales data would be reported. So there were detailed allegations with respect to not only the type of information that was going to be shared, but also that they would actually be required to actually meet and discuss it.

Think of *Todd v. Exxon,* a Second Circuit case. In *Todd v. Exxon,* they all participate together, the defendants, to craft the survey questions. There's no allegation that the individual defendants are coming together. You may be inferring it, Your Honor, but there is no allegation that the individual defendants in this case are actually coming together to decide what the survey questions are going to be.

Todd v. Exxon also involved a situation where after -- and this is why I said the date was important -- after the survey was designed and after the information was disseminated, Exxon's prices -- or, you know, the compensation for their, I think, engineers starts to decline. So you have a meeting, you have an exchange of information, and then you have a change in behavior, which, as I said before, is actually missing from this case.

So, again --

THE COURT: That's a sufficient set of circumstances. Is it a necessary set of circumstances?

MR. HARKRIDER: Well, look at *Container Corp*. So in *Container Corp*., the same situation is occurring. In *Container Corp*., you have an agreement between the defendants to actually -- defendant to defendant, defendant to defendant, to actually exchange information. And so what's happening is somebody says, you know, what was the last price you charged, and the other defendant actually provides it to them.

THE COURT: Isn't this just a more -- again, I'm not -- so we're clear, I'm not making any judgment about the claims here. But the allegations, isn't this just a more sophisticated mechanism for that that's alleged so that you -- I mean, looking at this nefariously -- and I'm not, except that I'm just reading the allegations in the complaint -- this is just a clever way to avoid that problem; you just use a third-party service. So you have an agreement about what information you'll exchange and you just, instead of meeting or e-mailing it to each other or calling each other or meeting, or whatever we used to do, now we just use a third-party aggregation service, and that way we don't even have to talk to each other directly, we can talk to each other indirectly.

Isn't it just even a more sophisticated and better mechanism than the one, for example, in *Todd*, more modern?

MR. HARKRIDER: Well, I think probably two responses.

The first is that you're essentially then making new law. There are no cases that we are aware of that hold that the use of a third-party benchmarking service alone in a market, let's say that is highly concentrated, which they allege, is alone sufficient to get past a motion to dismiss.

THE COURT: I think I agree with that. You used that word "alone" many times in the papers. I underlined it every time I saw it. It's not an allegation standing alone in

this complaint, is it?

MR. HARKRIDER: Well, I think it is respectfully with respect to the information sharing.

So you say there are other allegations, like allegations that the, you know, employees, high executives, are moving between the various -- you know, the various -- the various defendants but that doesn't necessarily tie to the information sharing. They don't say that once they go to the other defendant, they start, you know, discussing -- or they start, you know, discussing grower compensation or they start talking about Agri Stats.

THE COURT: Well, except that the defendants have -- again, under the allegations in the complaint, the defendants have interestingly decided not to impose confidentiality, nondisclosure restrictions, on high-level executives amongst themselves.

MR. HARKRIDER: Right. But there's no allegation that there's actual agreement to do so.

THE COURT: That's just not so, is it? I mean, the issue that I think we're having is, the plaintiffs aren't in the room, and that's not an unusual experience in these cases.

So aren't we left to evaluate all of the allegations in the complaint together in their totality to decide whether there's enough there to suggest that there's a plausible claim that the conspiracy that's alleged exists? It seems to me that

what you're inviting me to do here is consider these facts in isolation of each other.

I think I agree with you. I don't see a case that stands for the singular proposition that if you engage in a third-party aggregator system and you gather and accumulate information about your competitors in that way, that that's -- it's self-sufficient to establish an agreement. But that's only -- that's the vehicle that's alleged -- that's a vehicle that's alleged here is a mechanism, but there is an allegation that there is agreement between the defendants, and as further evidence of that are the other facts about the tours, the exchange of executives, and the like.

Am I not giving enough credit to the argument you're making, or am I misunderstanding it?

MR. HARKRIDER: I think the difference between what you're saying and what I'm saying respectfully is that there's an incredible lack of detail in what they're alleging. You might say, well, how could a defendant -- how could a plaintiff have detail at this stage of the pleadings? But if you look at the cases that they're citing, the cases that they're citing all have far more detail.

For example, when they're citing, you know, the -- they're citing, you know, *In re Fresh & Process Potatoes Antitrust Litigation,* which involved a meeting in the fall of 2004 in Blackfoot, Idaho, where specific individuals get

together and actually agree on essentially what is going to be, you know, production of potatoes.

When you look at things like *West Penn* or *Evergreen* or *In re Text Messaging*, all of those are cases where there is a meeting and then after the meeting there's a change in behavior. West Penn hates Highmark and then -- I'm sorry -- UPMC hates Highmark, and then after the meeting they suddenly won't deal with anybody that used to deal with Highmark. In *In re Text Messaging,* after the meeting, the prices go up.

And so could they have maybe said, you know, prices were at a certain level and then people agreed to exchange information vis-a-vis Agri Stats and then prices or, you know, grower compensation changed as a result of that? Perhaps.

But effectively what it seems Your Honor is doing is actually essentially what the Supreme Court in *Twombly* said you couldn't do, in the sense that what you're effectively having is parallel conduct. What is the parallel conduct? The parallel conduct is actually people subscribing to Agri Stats. The question is, why are they doing it? Are they making a unilateral decision, or are they making a decision pursuant to an agreement between the defendants? What's lacking is some plausibility around the agreement between defendants.

To take a step back, what your ruling might do is that essentially it would become almost unlawful, or at least you'd survive a motion to dismiss, if you used a third-party

information service, a benchmarking service, if your market was highly concentrated, which would have, you know, a very chilling impact with respect to something that people the Tenth Circuit itself had held --

THE COURT: I think that's -- I think I part ways with you completely about that. That seems like a dramatic oversimplification of the facts that are presented in this case. I think this seems to me one of the challenges with trying to apply the existing case law, is this seems like a very factually-intensive inquiry based on the face of the complaint. Among other things, we have to consider the market in which we're operating. We have to consider the nature, type, quality, and timeliness of the information we're exchanging. The other factors that are alleged here that give opportunity and support the plausibility of the underlying agreement, we've already touched on many of them.

I think the proposition you just stated is if somebody -- if this goes the way that I've suggested initially -- and I don't know yet -- I would strongly disagree with the proposition that someone apply the holding in some future decision to just say that if you aggregate information then you're liable.

MR. HARKRIDER: Well, I think --

THE COURT: That ignores all of the other evidence that's in the complaint.

MR. HARKRIDER: But I think that it -- respectfully it might not be that difficult to match those allegations. And so in any case, one could say, oh, it's a highly concentrated industry. In any case, one could say, oh, you know, we don't -- you know, the plaintiffs are getting a relatively small share.

But perhaps let's move on from that point and move to the point of at least -- I think there are two separate points. So one point is the fact that there is, in our view, very clear lack of a plausible geographic market. I think if you look at the case law that's out there, two points are worth noting.

The first point is that information sharing cases are almost always evaluated under the rule of reason instead of under a per se rule.

The second point is that under the rule of reason, the Tenth Circuit, for instance, in *Campfield v. State Farm Mutual Insurance* said that the rule of reason requires the plaintiffs to allege a valid market, and the claims brought by the plaintiffs that fall under the rule of reason must fall because of the legally inadequate market definition within his complaint.

So if you look at the allegation, the only allegation in the complaint is that the market is actually national, not a series of local markets across the United States, but an actual national market they plead in paragraph 40, but that's

inconsistent with the actual allegations in the complaint.

In paragraph 45 of the complaint, they allege that it's localized networks of production. In paragraph 89 and 141, they allege that the localized nature of production means that a grower's ability to market his or her services and design geographic proximity to integrators' complexes.

In *Wheeler v. Pilgrim's Pride* in the Eastern District of Texas, the court noted that due to the cost and other logistical concerns, the growers are typically located within 40 to 50 miles of the integrators' processing plants.

In *M & M Poultry v. Pilgrim's Pride* from the Northern District of Virginia -- Western Virginia -- of the Northern District of West Virginia -- sorry -- Pilgrim's generally contracts with broiler growers whose farms are no more than 50 miles from its feed mills.

So there's very little reason to believe that there's a national market and there are no facts to allege that it is, in fact, a national market. All the facts -- specific facts in the complaint suggests that they're actually local markets.

This court in *Drake v. Cox Communications* said that the proposed nationwide market for public service announcements was fatally overbroad and dismissed the complaint.

So we don't think that there is any plausible allegation that there is a national market, and we believe that the law is pretty clear that in the absence of a plausible

market definition that a case has to be dismissed.

THE COURT: Will you pause there for a moment, please?

MR. HARKRIDER: Yes.

THE COURT: I was a teeny bit concerned about this argument in advance of our hearing for this reason. As I read the papers again, it was clear to me that this was an issue that was addressed by the parties but not in great detail, the relevant market argument. What I've been thumbing through here is the briefing. I can't find where the relevant market issue is raised in the opening brief by the defendants. It is addressed -- I think it is in there somewhere; I can't find it.

In the reply, it merits about a paragraph of discussion, and I know that there was -- there is citation in the reply to the *Cinema Village* case and the *Wheeler* case but it's almost in passing. I'm not certain that the issue of the relevant market was adequately addressed by the parties and I haven't claimed exceptional expertise in this area. I know the relevant market is a issue and I know it's something that has to be addressed.

Can you point out for me where the argument is fleshed out in the opening brief? People have it? Yes, hi.

MR. CRAMER: It's in footnote 6 of defendants' motion.

THE COURT: Footnote 6 of the opening brief?

MR. CRAMER: Yes.

MR. HARKRIDER: Yeah. Page 11.

THE COURT: On page 11. So this is where -- this is what I was fearful of.

As I was preparing for this hearing and about the issues that needed to be addressed, this is one of the issues I was thinking about that I didn't feel like I was adequately informed of the law, which may be the reason I asked you the question I did when we started discussing this before, relevant market for what. It seems like a significant departure from the thrust of this. The central thrust of the argument is whether the plaintiffs have adequately pled the conspiracy or the constituent parts of the conspiracy.

What do I do if I think that I don't have sufficient briefing on the relevant market? Do we just have additional briefing, or is that a failure of proof by the defendants at this stage?

MR. HARKRIDER: So I think two things. So, first of all, the reason I think that there wasn't as much briefing is because the complaint itself doesn't say it's a rule of reason case; it says it's a per se case.

THE COURT: That's fair.

MR. HARKRIDER: And so our view was you need to allege it's a rule of reason case, and then I guess -- I don't know if we ferreted them out or they finally just said it's a

rule of reason case and then we responded to that.

THE COURT: That's fair. It's not a criticism.

MR. HARKRIDER: Sure.

THE COURT: I'm just -- I think that is a fair explanation, I think, of the development of the argument. Go ahead.

MR. HARKRIDER: Sure. I think our view is that it is the burden of the plaintiff to make credible allegations as to a relevant market. They've made allegations with respect to a relevant market but it's a nationwide relevant market, notwithstanding the fact that it is plainly local. And, again, I'm not sure why they did that, whether they believe it's national or it's because of the concern on class certification.

But our belief would be that the case should be dismissed, as many cases -- or several cases have held, that if you do not allege a credible relevant market in a rule of reason case, then the case should be dismissed.

THE COURT: I'm guessing that there are additional arguments you'd like to discuss before you sit, but let me ask you to jump ahead for a moment and address my preliminary thoughts.

If I conclude that there is an adequately pled information sharing agreement among the defendants under *Twombly*, then how do you think the "no poach" allegations or theory is addressed at this stage? Or is it?

MR. HARKRIDER: So they're alleging that "no poach" is a per se claim. It certainly would be helpful to analyze it within the context of a relevant market. We do think the "no poach" claim is literally *Twombly*. In *Twombly*, you had a situation where you had high barriers to entry -- this was regional Bell operating companies -- and, you know, Southwestern Bell, or SBC, didn't want to go to New York. So notwithstanding the fact that there was a clear allegation that they would not go into each others' territories, the fact was more easily understood as a result of the natural -- the barriers to entry that came from product differentiation.

So we think the "no poach" agreement is plainly and sufficient --

THE COURT: And if I agree with you, but I think the information sharing agreement is plausibly alleged, then what is the effect, do you think, in view of this motion?

MR. HARKRIDER: Well, I think two things. I think, first of all, if you were to hold that they have not alleged a plausible relevant market, and therefore, the information sharing were to fall apart, we would think that the complaint should be dismissed.

If you were to for some reason --

THE COURT: Let me stop you there --

MR. HARKRIDER: I'm sorry.

THE COURT: -- and say back to you what I think you

just said.

MR. HARKRIDER: Yeah.

THE COURT: That if I find that a "no poach" agreement is not plausibly alleged in the consolidated complaint, then what's left to evaluate today is evaluated under a rule of reason which draws the relevant market into the analysis?

MR. HARKRIDER: Correct.

THE COURT: Right. I'm with you. Go ahead.

MR. HARKRIDER: Now I think I've lost my train of thought.

THE COURT: You were doing so well too.

MR. HARKRIDER: Thank you, Your Honor.

I think with respect to -- I know I was going to make another point with respect to information sharing but you had wanted to address this. So I don't know if --

THE COURT: I guess the question I'm asking -- and I was interrupting you and it wasn't clear to me if you had moved off the information sharing agreement when you went back to relevant market -- but my question is, how is the motion addressed if I think there's an information sharing -- a plausible information sharing conspiracy alleged?

MR. HARKRIDER: I think if there's a plausible information sharing agreement that is alleged, I think there are two possibilities. You might find that they have not

alleged a plausible relevant market, in which case the case should be dismissed. You might find that the national market that they alleged is plausible for some reason -- obviously I think it's implausible -- and think that the information sharing part of the case should continue. But we do not believe that the "no poach" agreement has really anything to do with the information sharing agreement.

It might be fine if they want to, you know, use that as additional color, but we don't think it is an independent claim under Section 1 of the Sherman Act. In fact, courts routinely -- I was in a case in the Fourth Circuit, the *Saw Stop* case, where there were two claims and on a motion to dismiss the Fourth Circuit allowed one claim to go forward and dismissed the other claim.

So we don't think it's unusual at all if a claim is legally insufficient for it to be dismissed from the complaint.

THE COURT: So I understand the complaint to advance the theory that these are separate agreements among the same co-conspirators as part of the same overarching conspiracy. In those instances, you think that today is the day, this is the motion to separate one of those theories from the other and just remove, what, that set of issues from the case?

MR. HARKRIDER: I think remove it as an independent ground by -- as an independent violation of the Sherman Act. And so I think maybe two different ways of thinking about this.

One is that I don't know if Your Honor is going to have a written ruling, but I think it would be a little confusing to hold that a "no poach" agreement in this circumstance states an independent claim under Section 1 of the Sherman Act because it is so close to *Twombly*. The only allegations are that people didn't go into each other's territory in that case; and in this case, they didn't take each other's growers, not withstanding the fact that the growers plausibly really couldn't switch under the claims, you know, because of high barriers to entry which is what they allege.

But you might be asking a separate question, which is, you know, could you say that there is an overarching conspiracy, you know, that has these two constituent elements? But when you look at the allegations of their complaint, this is not a case where they're saying, you know, there's an overall agreement to fix prices and these are two parts of it. They say that there's an overall agreement to reduce grower compensation and there are two ways that they're doing it. One is through an information sharing agreement, which you've said you think has some plausibility, and the other is through a "no poach" agreement, which you seem to be leaning to suggest is implausible. So if the "no poach" goes, all you're left with is the information sharing agreement.

I'm not sure if that fully answers your question.

THE COURT: So let's think forward to the jury

instruction conference and we're discussing the form of the verdict that's going to go to the jury. I suppose the question that goes to the jury is, do you find for the plaintiff or the defendant on Count 1, which I assume is the Sherman Act claim; right? And then we'll have a set of instructions that explain to the jury what could constitute a violation of Section 1 of the Sherman Act claim. Or maybe we're charging the jury that they could only find a Section 1 violation if they found that there was an information sharing agreement or maybe -- I don't know. But this is my point.

We're not parsing out parts of the theory at this stage. If there is an actionable basis on which the jury could find for the plaintiff under Count 1, then we're moving past the Rule 12 stage, are we not?

MR. HARKRIDER: I would respectfully submit, first, that you might be wanting to move beyond the information -- you know, beyond the 12 rule -- beyond the pleading stage with respect to the count that survives, which is information sharing. There's a separate count, I think as I read it, for, you know, the "no poach" agreement. There's a "no poach" agreement and there's an information sharing agreement.

It's unclear to me how a market fact or color or atmospherics can state an independent cause of action. If it doesn't -- I'm sorry. Go ahead.

THE COURT: I'm reading Count 1 of the consolidated

complaint. It begins on page 38. It's a single count for agreement in restraint of trade, in violation of Section 1 of the Sherman Antitrust Act. It doesn't -- it doesn't set forth two separate claims; it's a single claim. It doesn't even set forth here the independent or separate bases in which it's alleged that the defendants violated the Sherman Act.

Am I focused on something that's just not of any great moment? Maybe I am.

I can anticipate that the next question might be this: If the motion to dismiss is denied and there's discovery served relating to the question of a "no poach" agreement, I can anticipate objections, and that's why I'm -- that's partially why I'm addressing the issue today.

MR. HARKRIDER: Right. I think not only can you anticipate objections, but I think my prime -- one of my primary concerns is just sort of -- I don't want to say judicial clarity when people are reading decisions, but I do think decisions matter and I think decisions matter in terms of the guidance that defendants take from them. Which is one reason I was concerned -- we share different concerns. But, you know, if you were to hold on information sharing, there is going to be an article in the antitrust trade press that says be careful of using benchmarking services because that alone may -- or I wouldn't say "alone"; I know we don't like that word -- but, you know, that can be used as something that, you

know, can impose antitrust liability.

Similarly, if you say, okay, there's this "no poach" agreement, that they're alleging a "no poach" agreement, and I'm going to allow those allegations, you know, they do specifically allege a "no poach" agreement. It's not as if they say there's an information sharing agreement and there's some "no poach" facts out there. They specifically allege a "no poach" agreement.

I think for the purpose of judicial clarity, it is worthwhile to have an opinion that says, first -- either, first, at the -- either, first, that parallel conduct in terms of not going after each other's customers and entering each other's markets in some respects where there are high barriers to entry doesn't plausibly suggest a violation of Section 1. I think that people would be surprised to find that if all you have done is simply not gone after each other's customers where there are high switching costs, that that would have some -- you know, attack some level of Section 1 liability. People read cases very carefully and they will cite that opinion back in, you know, many different contexts.

So, to me, part of this is a discovery issue but part of this is, you know, essentially -- I don't want to say you're overruling *Twombly*, but you're certainly reaching a different result than *Twombly* reached with respect to virtually identical facts.

I do have -- sorry.

THE COURT: Let me use another analogy. And maybe we are spending too much time on this issue. But I just have a sense that this could become an important thing for us to have an understanding about.

Let's instead think about a trade secret theft claim, where there are allegations that a certain executive defendant who left a company misappropriated trade secrets relating to product formulations, customer lists, and something else; there's a single claim advanced with constituent parts. And say there's a motion to dismiss the trade secret theft claim, and that motion fails because there are allegations in the complaint from which a reasonable jury could conclude that there was a violation of the Trade Secret Theft Act in this state.

You wouldn't at Rule 12, I don't think, ordinarily say, well, we're going to allow the case to proceed and the claim to proceed with respect to the product formulation claims but not the customer list claims. I mean, it seems to me that's the sort of work that's done at summary judgment once there's been an opportunity for discovery. Was there a factual basis to present to the jury as a means of finding a violation of the Trade Secret Theft Act that there was a misappropriation of customers lists? And maybe there isn't any. In which case maybe that has an effect on the evidence that's produced or the

form of the jury verdict form, for example. I don't think it's often the case that at Rule 12 at the beginning of the pleading stage, we would say, well, the case can proceed now with respect to the product formulations and something else but not the customer lists.

Is that an apt analogy? Maybe it's not.

MR. HARKRIDER: I guess the reason I'm not sure it's an apt analogy respectfully is that you could certainly imagine a court saying, you know, I've looked through the allegations of the complaint and, you know, there are specific allegations. Let's imagine that the claim is that, you know, a trade theft claim and there were customer lists and then product formulations; that's the allegation. Let's say there are specific facts that are actually alleged with respect to customer lists but no facts whatsoever alleged with respect to product formulations.

I can certainly imagine an opinion -- I think we've read them all -- that might say, I'm going to -- you know, having evaluated the allegations of the complaint, I'm going to allow, you know, the trade misappropriation claim, the single claim, to proceed because it looks like there is -- you know, there are specific allegations with respect to, you know, trade secrets, you know, with respect to, you know, customer lists. I don't find, however, that there are specific allegations with respect to product formulations; but notwithstanding that, I'm

still going to let the claim survive because there is enough with respect to, you know, customer lists.

So I think that courts routinely look at the allegations to see if the allegations are specific. You know, think about claims that allow -- in fact, this happened in the potato case. One of the defendants gets dropped because there are no allegations with respect to that defendant.

And so, you know, courts, I think, routinely look at the specific allegations, tie them back to the claim, and then might say, you know, we find it sufficient to go forward as a claim but only with respect to this part -- you know, with respect to these allegations, there are, in fact, no allegations. You wouldn't want parallel conduct after *Twombly* saying it doesn't violate the Sherman Act to say that parallel conduct can now be used to bolster, you know, lawful conduct, bolster an actual Section 1 offense.

So I'm not sure if that answers your question. That's why I said it's important to be clear in the opinion even if the claim were to go forward.

THE COURT: It's not super clear to me that the kind of ruling you just described is one that's often given, though maybe it is. I don't know. I'm mindful that -- I think part of the rationale for *Twombly* -- and it's essentially robust rationale in the context of antitrust claims -- is to ensure that we aren't putting defendants to too much time and expense

defending claims unless we determine that they're plausible claims in the first instance. So you can't just come into court, pay your filing fee, and now the defendants are on the hook for a five-year case and millions of dollars in discovery. But if the claim is going to proceed, if there are actionable theories, then I just -- it's not clear to me that the same rationale applies for the scope of the discovery on the theories in support of the claim.

Do you see what I'm saying? Let me be more specific. And maybe I'm being naive about this. I'm not sure.

But it seems to me that if the Sherman Act claim survives on the adequacy of the information sharing allegations, then the incremental additional costs related to permitting discovery on "no poach" is -- it's not significant. Not that there wouldn't be any, but surely there would be questions in many of the depositions that would already be taking place and surely there would be interrogatories and other things.

But it doesn't seem to me that the rationale for *Twombly* and the like at Rule 12 would provide a basis ordinarily for saying, well, we're going to just carve out one of the theories without discovery now on the basis of the allegations. But I'm not sure.

MR. HARKRIDER: Well, I think, again, it's two things -- and maybe I'm just an antitrust nerd, and called

worse -- but I do think opinions matter with respect to guidance. I respectfully suggest that the impact of the, you know, legal costs isn't just, you know, money out of pocket, it's also the chilling with respect to potentially procompetitive conduct. I wouldn't underestimate, you know, the difference between "no poach" allegations and Agri Stats with respect to, you know, discovery to begin with.

Agri Stats is very focused presumably in discovery. It is, did you believe in Agri Stats? Did you participate in Agri Stats? Were there meetings with respect to Agri Stats? What sort of information did you give Agri Stats and what was the impact with respect to prices? So that's Agri Stats. I mean, I'm sure there's other stuff but that's Agri Stats.

"No poach" is an examination of every single -- what we would think hundreds of relevant markets. Did somebody switch? What were the specifications of your house? Were those specifications so difficult that it was, you know, difficult for you to switch or not to switch? Did somebody ask you to switch? You know, who were the other integrators in the relevant market so that you could have switched to? Those are very, very different. They're both involving poultry, they're both involving plaintiffs, but they're not both involving the same core set of facts.

And so I think there's a huge difference with respect to the discovery burden, but I also think -- and, you know,

again, I might be different on this -- but the idea when somebody reads -- I think Your Honor might be really underestimating how much the new law is that they're breaking -- that you are actually creating because, you know, in all of the hub-and-spoke cases -- and this clearly is a hub-and-spoke case, and, you know, I think *Total Benefits* is a good case on this -- there needs to be an allegation with respect to the actual rim. All the other cases that are information exchange cases involve defendants actually meeting with each other. Defendants aren't actually meeting with each other to discuss -- you know, no credible allegations, you know, on a specific date people met to discuss Agri Stats.

So you have a bunch of these vertical agreements and there's a huge difference between those vertical agreements, which, you know, *Intracorp* is again vertical agreements. I'm just wondering, How does one even distinguish *Intracorp* from this case? Is it market definition? I mean, what's the distinction? The Tenth Circuit has already held that it is procompetitive to try and exchange information for the purpose of reducing costs. It might not be lawful if the market is, you know, a properly defined relevant market, et cetera, you know, to have an agreement between defendants, but these are still, you know, sort of parallel -- this is still parallel conduct. And so, you know, what's missing, again, is -- I know I'm going back to information exchange -- but what's really

missing is the rim. So that's why I say this case is so unusual.

People are very concerned about not just discovery costs, but who knows what a jury is going to hold and so that puts pressure on people to settle one thing. And then the other thing is knowing that there's going to be pressure to settle joint and several liability, and all of those things that occur in antitrust, cause sort of a chilling impact where somebody says, do I want to subscribe to an information sharing service? I'm in the automobile industry. Do I want to, you know, subscribe to this service, you know, to reduce our costs because it's highly concentrated, you know, the person who was the head of Ford used to be the head of GM. I mean, you can -- these allegations are not that difficult to actually come up with.

That's why courts have actually in information exchange cases required these two elements. They've required, first, element of an actual agreement between defendants around the rim, which is entirely missing from this case, or they've required either -- you know, required specific allegations with respect to whatever the relevant market is. You can imagine additional allegations, like after we exchanged information prices changed. They know their compensation that they're getting.

You know, you talk about, for instance, you know, the

burden that a plaintiff is under because, you know, they're not in the room so how can they make specific allegations as to what was agreed during a conspiracy? But they know their own prices. They know their own compensation. They certainly were capable of alleging, you know, that people joined Agri Stats in 19 -- you know, in 2008, and after 2008, you know, our compensation went flat, it went way down, we got a different share of it. I mean, there's no reason why they couldn't have made those allegations. That's why people -- and the reason is because information sharing and cost benchmarking, the Supreme Court has held and other courts have held, is actually procompetitive.

So, you know, in a roundabout way I'm trying to tie this back to the discovery costs. The discovery costs is not just, oh, this is very, very expensive. It's also because it's very expensive, how do I change my conduct as a business? And that's why I was starting off by saying, you know, the antitrust laws are the Magna Carta of free enterprise. Because your ruling would essentially be that from now on simply subscribing to an information exchange service, a third-party service, without ever talking to another defendant about it, if the market is otherwise highly concentrated, can violate the Sherman Act. That's a step no one has ever made before and certainly has a chilling effect, among other things, on everybody who operates information sharing businesses because

why -- why would you ever subscribe to it?

I just want to make -- I know I've been talking for a long time. I just want to make a couple points just on this, you know, broad overarching conspiracy. In *Processed Egg Products Antitrust Litigation,* the plaintiffs tried to allege an overarching conspiracy to cut egg supply, and the court held it can't possibly correct that plaintiffs can plausibly allege a single overarching conspiracy with per se liability for all manners of conduct which might otherwise singly be evaluated under the rule of reason.

So we know we need to -- we can't just group it all together and through the sum of the parts turn this into something other than a rule of reason case.

And then if you look at *Continental Ore v. Union Carbide,* they say that, you know, allegations maybe have to be evaluated in their totality. But if you look then at, you know, *Citric Acid* and *Baby Foods* and *Delta/AirTran,* all of those three cases hold that participation in information exchange alone is insufficient evidence of an overarching conspiracy.

So going back to this idea of can you have an overarching conspiracy simply by alleging information exchange, that's why I want to be very factual that you would be very concerned if there was a ruling that said because they subscribe to Agri Stats, there's this overarching conspiracy to

cut grower compensation that involves "no poach" and all these other things. That doesn't seem credible to us. At the very least, we would suggest that your opinion would be cabined simply to information exchange without giving credibility to the "no poach" allegations and then look rigorously at whether information exchange actually meets the standards of the rule of reason, which it is black letter law in this circuit and throughout the United States that you need to allege a relevant market.

You might also be able to allege, for instance, you know, some impact, you know, that prices declined, but they don't make that allegation and they could have made that allegation. There's no information asymmetry with respect to the prices that -- you know, the compensation that the plaintiffs themselves are getting. They could have made it and they didn't, and I suspect they didn't make it because they couldn't have made it because they knew that since 1980 their compensation has been declining. But Agri Stats didn't exist in 1980, to my knowledge, and it's certainly not alleged in the complaint.

So I think -- just taking a huge step back, I think we maybe agree on the following propositions. I think we agree that we're not able to find a case that says participation in a third-party benchmarking service, without detailed allegations that there is an agreement among defendants to all use Agri

Stats without, you know, a date on which that agreement was made, without, you know, detailed allegations that they all got together and discussed it, and without detailed allegations that prices changed as a result of it, no one's reached that result. A lot of courts have actually reached the result that participation in information exchange -- again, the *Intracorp* in this circuit have actually held that it is fine to do so, even though in *Intracorp* they're talking actually about chiropractors' prices. Now, it's not the chiropractors exchanging that information, it's another third-party service that's exchanging that information, but it very clearly and plainly has an impact on price.

So you're making a decision that no court has made before in a pretty important area with respect to a practice that's pretty widespread. And from now on everybody will know that simply participating, I never talked to a defendant about it, I simply participated, I subscribed, I paid my money, and I got my data, that that itself, if my market is highly concentrated, which is really the biggest fact that they allege here, will get beyond a motion to dismiss and expose me to millions of dollars in legal fees.

If I'm a general counsel -- and, you know, I have members of the legal department in this room -- I would certainly counsel my company, don't subscribe to those services; or if you do, there's a substantial legal risk of

doing so.

So, you know, we're respectfully suggesting that it is new law with respect to information exchange; it is new law with respect to saying, okay, even though it's rule of reason, even though there's no impact on price that's alleged, that you don't need to allege a relevant market and potentially making new law saying, okay, well, I have only this information exchange claim and I'm going to bundle everything else back into it, even though courts have held that information exchange is not a sufficient umbrella to pack in an overarching conspiracy.

So I'm not a judicial activist, I'm not suggesting that you are, but my view is that courts, especially in antitrust, should be very careful to follow precedent and depart from it when it makes obvious, you know, sense to do so. But these are recent cases and we're aware of -- you know, information exchange has been evaluated many, many times, there are dozens of cases out there, and yet none of them involve this fact pattern.

THE COURT: Thank you. Just one moment.

(Discussion held off the record)

THE COURT: I think we've been going about an hour, and I know this much, and especially at the clip at which Mr. Harkrider was speaking, our court reporter's fingers are about to fall off. So we'll take a ten-minute recess and

convene here with a response from the plaintiffs. Thank you.

(Short break)

THE COURT: Mr. Cramer.

MR. CRAMER: Thank you, Your Honor. May I proceed?

THE COURT: Please.

MR. CRAMER: So I thought I would start clearing up some misconceptions about the complaint and then jump over to some of the arguments that my opposing counsel made about the information sharing agreement and I'll cover relevant market and what should be done regarding "no poach" and discuss the "no poach."

But let me start at paragraph 151 of our complaint because Mr. Harkrider made a big deal out of the fact that we as the plaintiffs do not allege some change to prices or compensation as a result of the alleged conduct and that's just false. For example, in paragraph 151, we plead, "Since at least 2007, inflation-adjusted Grower pay has shown a significant, downward trend, while consumer prices have increased; this widened gap between farm gate prices and retail prices shows that neither the Grower nor consumer are better off under the Integrators' collective grip." And it goes on like that.

It alleges in paragraph 137 that as a result of the alleged conduct, the information sharing and the "no poach," the growers' compensation has been suppressed. And I'm a

little surprised, in fact, to hear defendants challenging that point, given that the defendants have admitted it in their motion. At one, they say that the entire purpose of what they call benchmarking is for the defendants and all the co-conspirators who have agreed to share information through Agri Stats do that so as to control their own costs, presumably nationwide since the information is being shared nationwide. What is one of their biggest costs? How much they pay the growers.

So it's a fair inference from what the defendants are arguing about why they are joining and giving information to and getting information from Agri Stats. They're doing it to reduce grower pay; that's why they're doing it. That is the main anticompetitive effect and entry alleged in the case.

Under the *Been* case, we know, and under monopsony principles and antitrust principles, when someone's pay is reduced, they produce less of it; and when there's less of something, the supply goes down and the price goes up.

And so what we see here as a result of the allegations here, what plaintiffs have pled, and what the defendants have essentially admitted, or at least the implications of it, is that their information sharing and other conduct has led to reduced grower compensation, reduced output of broilers, and therefore, higher prices to consumers overall. Those are anticompetitive effects of the challenged conduct that we

allege in this case.

Let me address Mr. Harkrider's point about -- that he made several times to Your Honor about how this will be the first case in which joining a benchmark organization is found to be illegal and we're going to send a chilling effect around the world as a result of it.

First of all, as Your Honor pointed out, this case is not simply about joining Agri Stats. But secondly, the allegations in this case, if they are accepted, as they must be, are allegations that meet the guidelines of the Department of Justice for when we determine an information sharing agreement, or information sharing among competitors, is anticompetitive and they meet the three-part test set out in *Todd v. Exxon,* the Second Circuit case that the defendants have cited.

What is that test? The question is: Is the information being shared current or historical? Is the information detailed or aggregated? Is the information secret or public?

And here, we have a situation where the information is current; they're exchanging this weekly or monthly. It's detailed. We allege that each of the integrator companies are able to disaggregate it, view it, determine each grower's compensation at each facility. And it's nonpublic, it's secret, they share it with no one other than themselves. The

growers do not get that information. We allege that the growers aren't even able to share their own information with other growers.

The reason why that is anticompetitive is it puts power, unfair power, in the hands of the integrators which they use to suppress compensation to the growers because knowledge is power in a negotiation. This is why they share the information so they have power vis-a-vis the growers.

So we have -- we have an allegation of the very type of information sharing that the Supreme Court has deemed anticompetitive, *U.S. v. Gypsum* as to the first prong regarding current. *U.S. v. Gypsum,* the Supreme Court says exchanges of current price information have the greatest potential for generating anticompetitive effects and have consistently been held to violate the Sherman Act.

Again, we claim -- we claim, allege, that it's granular, it discloses the intricate details of every integrators' business. Paragraph 74 we allege that every cartel member knows the base grower compensation paid by every other cartel member, and therefore, are able to constantly monitor each other's compensation levels to growers. And the sharing of information in this detail has long been deemed potentially anticompetitive. As the Supreme Court said in *Gypsum*, regardless of its putative purpose, the most likely consequence of any such agreement to exchange price information

would be the stabilization of industry prices.

Again, as I said, the agreement -- the information that's shared is secret. *Todd v. Exxon* stated that public dissemination is the primary way for data exchange to realize its procompetitive potential.

So the defendants cited to Your Honor, though they did not mentioned today, the *Maple Flooring* case. That's another Supreme Court case regarding information exchange. Why did the *Maple Flooring* case, the information sharing there, pass muster where it didn't pass muster in *American Column & Lumbar* and *Gypsum* and *Container*? Why in *Todd*? Because the information -- in *Maple Flooring,* the information that was exchanged was published in journals, it could be used by both sides of a negotiation, it could be used by the public, and it was also aggregated in general.

So here, we have the very type of information being exchanged that the Department of Justice and courts have deemed anticompetitive.

All right. Let's talk about -- but obviously the mere fact that information is being exchanged doesn't make it a violation of the Sherman Act. Plaintiffs need to plead agreement, that there's an agreement among the defendants to share the information.

What have we heard from the defendants? Well, defendants say the co-conspirators didn't agree with each

other, they just agreed with Agri Stats to share information. And then they also say that in all of the cases -- or many of the cases that have found agreement, there are co-conspirator intercommunications about the shared information and those intercommunications are really what established the agreement. We don't have that here. So their entire argument, though, rests on the notion that exchanging the information through Agri Stats insulates what would otherwise be an illegal information sharing cartel.

So let's talk about that first argument, whether co-conspirators are allowed to share information with Agri Stats and then that information gets transmitted back to the defendants and that's not an agreement. They say that it's a hub-and-spoke but there's nothing connecting the rim, these are just everybody has these independent agreements with Agri Stats. That's just wrong. How do we know it's wrong?

There are two principles that we can draw from agreement cases, and information sharing cases in particular, about when there's an agreement to share information; number one, when there's a conscience commitment to a common scheme or a common understanding.

Well, what is the common understanding here? The common understanding is, as we've alleged -- and I don't even think it's denied -- that the co-conspirators shared their own detailed, competitive, internal information because, and for

reciprocity, in order to get that information back. That is why they're joining Agri Stats, so that they can give information and get information. That's not a unilateral act. If all I did was share information and get nothing back or expect nothing back, then that wouldn't give me what I want. What I want is shared information.

And then the second point, which I've alluded to -- and this comes out in all of the cases -- the key thing that's connecting all of the co-conspirators is reciprocity, they are exchanging information with each other. Yes, they're funneling it through Agri Stats, but the whole point of it is to exchange information with each other.

THE COURT: But Mr. Harkrider says those two elements are entirely legal conduct, lawful conduct, even procompetitive conduct.

MR. CRAMER: Well, there's two different things; number one, is there an agreement; and number two, is the conduct that they have -- the thing they've agreed to do potentially anticompetitive?

The way I started was to tell Your Honor, well, there are -- the kinds of information being exchanged between the co-conspirators here is of the type that the Department of Justice, *Todd v. Exxon,* and the Supreme Court have said are potentially anticompetitive, current, granular, detailed, and secret; right?

If all this was was they shared information with some industry group and the industry group aggregated it and then published it on the Internet so everyone would know about it, that would be a very different situation; right? Then we would not have the case that we have.

THE COURT: I understand. But the two elements that you just addressed, the purpose of joining an information aggregating service like this, that's going to be present for every entity that enters into a relationship with an information aggregator. They are going to do it for the purpose of sharing information with the hope of getting information so that they can make business decisions, and courts have said that's fine.

MR. CRAMER: Yes. So it is fine as long as the information doesn't meet the test. And then, of course, as Your Honor pointed out, we allege other things that have gone on in the marketplace that lead us to believe that this information is being used for nefarious ends.

For example, one of the things that Mr. Harkrider said, which was incorrect, is that plaintiffs do not allege communications about the data among and in between the co-conspirators; in fact, we do.

In paragraph 121 of the complaint, we allege that Agri Stats hosts regulator poultry outlook conferences for the co-conspirator executives. It's certainly a reasonable

inference from the complaint that at poultry outlook conferences run by a data aggregation service that they talk about the data at those conferences.

And we allege in paragraph 77 there are regular chicken media summits, including plant visits and panel discussions among senior executives of broiler production metrics. Well, where would you get these metrics if not for the information sharing?

THE COURT: Did you say 77?

MR. CRAMER: 77.

THE COURT: Right.

MR. CRAMER: We allege in paragraphs 103 and 104 that through the National Chicken Council, defendant executives met regularly to discuss, quote/unquote, growout operations. Again, these are all meetings among high-level executives of the defendants and other co-conspirators in the context of a situation where they're all sharing detailed, granular information --

THE COURT: Okay.

MR. CRAMER: -- about their business.

THE COURT: And Mr. Harkrider will stand up and reply before we finish and say, Judge, here's a dozen cases that tell you that meeting in industry meetings is not evidence of any unlawful conduct or any nefarious agreement. And your answer, I suppose, is, right, except that these are additional

factors that are pled here that you take into consideration in the totality of the pleading.

MR. CRAMER: That's exactly right. We are not alleging that the mere fact that there are industry meetings by itself standing alone proves anything.

THE COURT: Or facility tours or executive exchanges or information exchanges or anything else. Except all of it together, you suggest, gives rise to a plausible allegation of this agreement in the first instance?

MR. CRAMER: Correct. For example, I imagine -- take a hypothetical.

Let's say there was a situation where each of the alleged co-conspirators lived in plastic bubbles and never communicated with the other one ever, they could not communicate. I imagine the defendants would say they have had no opportunity ever to meet with each other. They never saw each other. They never communicated with each other. They never shook hands. They never exchanged anything. They couldn't, they're in plastic bubbles; right?

So the reason why courts look at opportunity evidence is because it makes it more likely that the other allegations of an agreement are plausible. We have opportunity evidence where they're regularly meeting, Agri Stats is running conferences, and they're sharing data.

I mean, in *American Column & Lumbar*, the Supreme Court

says that genuine competitors do not make daily, weekly, and monthly reports of the minutest details of their business to their rivals. This is not the conduct of competitors, but it's so clearly that of men -- it was men then -- united in agreement, expressed or implied, to act together and pursue a common purpose; right? They're sharing detailed information about their businesses with their rivals. They're meeting with them regularly.

Defendants themselves admit and agree that one of the things they do with the shared information is use it to control their costs, nationwide presumably because it's a nationwide information sharing agreement, and thereby suppress compensation.

Now, to get back to the argument that merely because they are sharing the information through Agri Stats that somehow this is all insulated, that they're not agreeing with each other, that they're only agreeing with Agri Stats, that's just -- that's just putting form over substance; right?

I mean, let's say Agri Stats was setting a price for how much growers get paid and setting a price for how much broilers should be selling at, they set the sale price and the grower price. And all of the defendants agree to join Agri Stats and abide by its prices knowing that everybody else is going to agree to join Agri Stats, to abide by its prices.

Would defendant stand up here and argue that's not a

cartel because all they're doing is agreeing vertically with Agri Stats in their own unilateral interest to charge the price that Agri Stats has determined based on the information? Of course not. Of course that's an illegal cartel.

It's the same thing here. Running the information through Agri Stats doesn't change whether or not the fact that there's reciprocity and a common scheme. I think that the agreement part of it is very clear.

You know, the defendants have said this is a hub-and-spoke conspiracy. It's not a hub-and-spoke conspiracy. In a hub-and-spoke conspiracy, what's happening is the hub at one level of the market is getting the spokes at another level of the market to help the hub eliminate competition for the hub.

So Toys "R" Us, right, that's a traditional hub/spoke conspiracy. Toys R Us, a powerful toy retailer, says to the manufacturer, toy manufacturers, don't sell to the big-box retailers, my rivals, because that's going to benefit me. And so all of the toy manufacturers agree with Toys R Us not to sell to Toys R Us' competitors. That's a hub/spoke conspiracy. There's nothing exchanged between the spokes in Toys R Us and the hub/spoke is for the benefit of the hub.

Here, we have the opposite. The hub itself says -- Agri Stats says, the purpose -- my purpose for existing, as we allege in the complaint, is to help the co-conspirators, that's

my purpose for existing. And defendants themselves say they used the shared information to suppress their costs, including grower compensation presumably. So this is not a hub/spoke. We have direct information going from and to the different spokes. We have a common understanding between the spokes. The whole purpose of the organization is that they are sharing information with each other.

Several of the cases, *Container Corp.* and *SRAM*, basically say that it's the information exchange itself that constitutes the agreement. So in *Container Corp.*, the Supreme Court says that the proof of the information sharing turned on each competitor radically providing information, quote, with the expectation that it would be furnished reciprocal information when it wanted it. There's no document to which all of co-conspirators agreed -- in which they agreed to share information. No. The agreement was inferred from the reciprocity.

Same with *SRAM*. In *SRAM*, at 902, the court stated that the exchange of price information alone can be sufficient to establish agreement under the Sherman Act. Plaintiffs need not allege the defendants actually discussed the prices they exchanged. So that's *SRAM*.

So I believe we've established agreement and we've established that the agreement has the potential to be anticompetitive because of the type and character of the

information exchanged.

One other point about a third party -- that Agri Stats, a third party, being involved. In both *Lindseed* and *American Column & Lumber*, those information exchanges were run by third parties. There was a third party in both of those cases that organized the information that the information flowed through. And I believe it was in *American Column* that American Column, that organization, that third party, had a manager of statistics who would deal with all the statistics and then disperse it to all of the different member companies.

But both of those cases are cases in which third parties were organizing and running the information sharing exchange, just as we have Agri Stats doing here. They are the -- they are the hub -- they're not a hub in a hub/spoke conspiracy, but they are the vehicle through which information is being exchanged. But the bottom line is that the defendants are exchanging information.

Mr. Harkrider cited the *Intracorp* case from the Tenth Circuit. Okay. So that is a case where insurance companies shared information relating to prices charged by chiropractors. First thing to note about that case is that the plaintiffs didn't allege an illegal information sharing agreement. They did not -- the information sharing was part of what was happening but they did not allege illegal information sharing.

Second thing about that is the court observed that the

prices being shared were not prices that the insurers were fixing, they were prices that somebody else was charging, the chiropractors.

And third, which seemed to be important to the court, was that the ultimate result of what the insurers did with that information is they said that no chiropractor will be reimbursed below the 80th percentile of what all the chiropractors are charging in the region. What the court noted was, well, that caused a lot of chiropractors actually to make more money because it's at the 80th percentile, and it said basically what they've been finding was instead of being harmed, these chiropractors actually were benefited. That's what the Tenth Circuit said in that case. It's not an information sharing case. It's a case where the information being shared was not the information -- was not being used by the companies. And the ultimate result, the allegation in the case regarding an agreement to suppress compensation to chiropractors, was that chiropractors were benefited. So that case is very different.

And, in fact, there is no case that defendants have cited in which plaintiffs have alleged information sharing among competitors that was granular, current, and secret in which a court dismissed it. There's just none. All of the cases, the Supreme Court cases, the *Todd v. Exxon* case, all of the cases in which there's a similar allegation of information

sharing have gone forward after either a motion to dismiss or summary judgment.

Let's talk about relevant market. Now, defendants make their relevant market argument in a footnote in their opening motion, and I guess their claim here now is they thought plaintiffs were arguing a per se case, or putting forward a per se case, so therefore, didn't think they needed to raise the relevant market issue.

THE COURT: In fairness, it was not super clear to me, it wasn't the first time I read the complaint.

MR. CRAMER: I think the answer to that is plaintiffs were being careful. If the court ultimately decided that what plaintiffs had pled was not per se, plaintiffs wanted to make sure that it would survive the rule of reason, which is a perfectly legitimate thing for plaintiffs to do. That's why we included allegations, lengthy allegations, related to relevant market and relating to anticompetitive effects. So those are all in the complaint and they're clearly adequately pled, I believe.

THE COURT: And you'd point to what paragraphs in the complaint relating to the relevant market and anticompetitive effects?

MR. CRAMER: Yes, yes. So let me talk specifically about the market.

So plaintiffs plead a nationwide market for growout

services. Well, first, let me step back and say, it's very rare for a court to dismiss a case on a motion to dismiss because of inadequate relevant market allegations, it almost never happens. It is almost impossible for -- in this case defendants cite, I think, one case -- they mentioned it today -- in which they say the plaintiffs' market was too broad. Typically, the cases in which plaintiffs fail on a relevant market, either on a motion to dismiss or summary judgment, is because the defendants say the plaintiffs have tightly gerrymandered their market to exaggerate their market power.

Here, weirdly enough, the defendants say, no, no, the market's too broad, we don't actually compete with each other across the country. I would say that is belied by the allegations in the complaint.

First, I would point Your Honor to paragraph 135 of the complaint which directly contradicts some of the things that Mr. Harkrider was saying. Let's look at paragraph 135. It says, "Absent the conduct challenged in this Complaint, Integrators would consider each other to be competitors for Broiler Grow Out Services whether Integrators happen to be in the same region or not, given that integrators (a) could open plants in areas where another Integrator (or other Integrators) already exist, and (b) would compete with each other on a nation-wide basis for established Growers or to incentivize

potential new Growers to move to areas where Integrators have established Complexes."

So plaintiffs have argued that if under the SSNIP test that was raised, right, all that means is that if at one area compensation gets below competitive levels, that people would move to another area. What we've alleged is in a world absent the "no poach," in a world absent the information sharing, instead of stabilizing prices so that they're all the same, growers very well would compete with each other for the best -- not growers -- integrators would compete with each other for the best growers; right? They're very concerned about who are the good growers that run this tournament system and reward the top growers more within a region than the bottom growers; right? So they really care about efficient growers. Well, what's the best way in a world without a cartel to get more efficient growers? Raise your compensation.

THE COURT: Well, except that they say that those growers have to be within a certain number of miles of their plants or it doesn't work. So what does it matter if the best grower in the nation wants to come and work for me and they're 1300 miles from my processing facility? I can't use that grower. That's what they say.

MR. CRAMER: That is true, except that we have a country in which people move. You don't need everyone to move; right? You don't need every single grower to move. In order

to have an effect on prices, you need the marginal grower to move; you need a few growers to be willing to say, hey, this area, this integrator seems to be rewarding growers more, I want to open up a second operation 200 miles from here to be near that integrator.

THE COURT: Don't the plaintiffs maintain that about five percent of growers move annually, I think?

MR. CRAMER: Yes. Now, we also allege that three-quarters of the growers are in areas where there's more than one integrator so there could be movement even within an area. So you don't have to actually pick up and move your farm or move your farm entirely, you can move within a region or move to another region.

THE COURT: Except that I think that the plaintiffs also maintain in their complaint that that's not a practical thing for most growers to do because of the oppressive cost in investment that's required in the facilities, discrete to each integrator, and then it would be -- not only is it prohibitively expensive to move, they can't even operate where they are now because of the compensation rates.

MR. CRAMER: So that is all true. We have alleged high barriers to mobility, high barriers to movement, and that tends to be actually a plus factor for the existence of a conspiracy, because if mobility was extremely flexible, then a cartel would work. In order to make the cartel work, you just

need to reduce mobility of a few at the margins.

But let me just step back and say, Your Honor, we're having a highly-detailed, economic argument about mobility and whether or not growers would move to a region of high compensation from a region of low compensation; or it doesn't have to be old growers, it could be new growers. I decide I want to get into the business, where do I go? I want to go to the place with the high-compensation region as opposed to a low-compensation region. So it doesn't have to be someone moving; it can be someone deciding, I was on my family farm, I want to start a new farm, where should I do that? Well, I'm going to do that in a high-compensation region.

But, again, this is a factual determination. This is why courts are loathe to decide relevant market on a complaint on a motion to dismiss.

THE COURT: Except that Mr. Harkrider and the defendants would say, this is an important and essential consideration when we're evaluating the plausibility of the "no poach" agreement, and that that question has significant consequences because we only reach relevant market if we don't accept the plausibility of the "no poach" agreement theory.

MR. CRAMER: Well, I mean, another -- another point is that -- well, let me make two points.

First point is, under Supreme Court law, plaintiffs actually don't need to prove relevant market under the rule of

reason; plaintiffs need to prove anticompetitive effect.

So if Your Honor looks at *Indiana Federation of Dentists,* at 460 to 461, the Supreme Court says that the purpose of market definition is to assess whether the conduct could have an anticompetitive effect. This is the quote: "Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effect, such as reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effect."

So plaintiffs would need to show anticompetitive effect and nationwide effect from a nationwide agreement. That's what plaintiffs have pled, a nationwide agreement to exchange information and share information, which the defendants have admitted they used to suppress their costs, including presumably grower compensation nationwide. Plaintiffs have alleged that the base compensation that the defendants used to pay growers tends to be similar across the country in part probably due to the information sharing. Plaintiffs have pled directly that the challenged conduct reduced grower mobility, suppressed grower compensation, restricted broiler output, and artificially inflated broiler prices nationwide. So we have direct allegations of anticompetitive effect which would obviate the need to prove relevant market.

The next thing I would say about relevant market is whether the market is national or local. So let's say the fact-finder found that there is no national market, or there's only a national market with respect to the information sharing, but there's regional markets with respect to "no poach." That wouldn't mean the case wouldn't go forward. Plaintiffs would need to show various different agreements in different regions and that those agreements had an effect in those regions; right?

I mean, it doesn't -- the fact that there may be eight markets or ten markets or thirty markets doesn't change the validity of the case. It obviously makes it more complicated. Plaintiffs believe there's a national market. Plaintiffs believe we have proved a national effect. Plaintiffs believe that these integrators in different regions have an effect on each other and ultimately compete with each other for grower services. But that's -- you know, yes, their mobility is low but it's not zero. There is mobility and growers compete and they would compete much, much more in a "but for" world absent the information sharing which reduces incentives to move because they're all stabilizing their compensation and the "no poach" which reduces the ability to move.

THE COURT: Did I understand you to say in that exchange -- this is where I'm handicapped, I think, because of the nature of the briefing and the evolution of this issue in

the papers and without any independent expertise in this area -- but I think I understood you just to say, well, we don't really need to plead the relevant market under the relevant theories, we just need to say there's a market and then later we'll prove it up. That's what I thought you said. You haven't pled regional markets. You've only pled a national market, one single, relevant national market.

MR. CRAMER: Right. But we've pled -- the whole purpose of pleading -- the purpose of a relevant market and the reason why one is defined is not in Section 1, right, there's no relevant market in Section 1. The reason why you define a relevant market is, as the Supreme Court said in *Indiana Federation of Dentists*, to help prove detrimental effects. And what we've pled are detrimental effects directly from a nationwide agreement so that obviates the need for relevant market entirely.

THE COURT: You don't think there's a notice issue in the pleading identifying the relevant -- I mean, what happens when we get the expert reports and you're talking about a different market that the defendants thought they were going to conduct discovery about because it wasn't mentioned in the complaint?

MR. CRAMER: Well --

THE COURT: What happens when the expert report comes talking about regional markets and impacts in regional

markets, and the defendants say, we didn't conduct any discovery about that because you pled a national market?

MR. CRAMER: Yes. Though, Your Honor, what defendants are going to argue -- they've already started arguing -- is that there are regional markets and they will make that argument. All their discovery will focus on proving that there's no national markets; in fact, there's a bunch of regional markets, and our discovery will try to get to the truth. If the truth is what we allege, what we believe, is that there's a national market, that's what our economist will say. If the truth is that there's eight regional markets and they have market power in each market, then that's what our expert will say.

But the bottom line is, if defendants have used information sharing and "no poach" to suppress the compensation of growers and anticompetitive effect -- and defendants have admitted they did -- and we can prove it, then that obviates the need to prove a relevant market entirely under Supreme Court law.

THE COURT: All right.

MR. CRAMER: But that's what I would say. This case, if it goes forward, one of the issues that discovery will be taken about is the nature of the relevant market. I imagine we're going to have a big dispute about it. I don't think it's a notice issue. They know what their defenses are.

Let me address --

THE COURT: I invited you at the beginning of that exchange to identify -- maybe this is unfair on the fly, but maybe one of your colleagues can take a moment and focus on this -- I invited you to identify the specific paragraphs in the complaint that you would point to in support of your relevant market allegations and anticompetitive effect allegations but we can come back to that.

MR. CRAMER: No. The complaint, I think, helpfully has captions to that effect. So I would look at page 30, paragraph 129 -- or right above that there's a caption that says "Relevant Market and Monopsony Power." So I would point Your Honor to 129 through the end of that section, 136, and then there's a -- on page 32, there's a caption, "Anticompetitive Effects and Injury Suffered by Class Members," and that runs from 137 all the way to 154.

Now, I wouldn't say that that's exclusive. There are probably other things in the complaint that relate both to relevant market and anticompetitive effects, but the purpose of those sections was to lay out what we thought as our allegations on those points.

All right. Let me say a word about procompetitive justifications and then I'll talk about "no poach." On procompetitive justifications -- I think I've addressed it mostly -- but the defendants claim that the reason why

companies exchange information through information sharing, organizations like Agri Stats, is to benchmark and to help them be more efficient and that is certainly true in some cases. I've explained why there's a test to look at those kinds of cases, where it tends towards the anticompetitive as opposed to procompetitive, whether it's current or historical, whether it's granular or aggregated and averaged, and whether it's secret or public, right, and all of those checkmarks go in plaintiffs' favor.

But the other thing I would say about that is, again, come back to defendants' admission. They admit that one of the things they used the information for is to suppress their costs. One major cost of theirs is the growers. That's an anticompetitive effect, not a procompetitive effect.

I'd finally say that to the extent that balancing of anticompetitive effect and procompetitive effect need to happen in this case, the motion to dismiss is not the appropriate time for that balancing act to occur.

THE COURT: Will you say that last part one more time, please?

MR. CRAMER: That to the extent that there will be balancing between procompetitive and anticompetitive effects, which is part of what the court or the fact-finder will do in a rule of reason case, that is for the fact-finder or later on summary judgment to see whether plaintiffs have established

that anticompetitive effects, to the extent they exist, exceed procompetitive effects.

THE COURT: And is one of those questions going to be whether -- I mean, the defendants, for example, cite secondary sources, I think journal articles or the like, about the procompetitive effects of benchmarking and other things. And will a question here be how the defendants use the information that they get from Agri Stats?

MR. CRAMER: Yes. That will be a big part of what the economists and fact-finding will get to, how is the information used. Is it simply aggregated and used to make them more efficient? Or is it more towards what plaintiffs are saying, that they're essentially using it to stabilize prices that they pay the growers for broilers? That will be part of what this case is about, a big part of what this case is about.

Let me talk for a minute about "no poach." I know Your Honor feels, and the defendants have argued, that there are no direct allegations of a "no poach" agreement but Your Honor did mention at the outset that there is paragraph 80 which I think is important. Because in paragraph 80, plaintiffs plead that an employee of a co-conspirator, Peco, told a Tyson grower that he could not be hired due to a no-hire agreement between those companies. Just like that fact pattern where we have a "no poach" agreement, in the context of paragraphs 81 through 84, where plaintiffs allege multiple growers and industry observers

have learned that once you work for one there's a brick wall and you can't work for another, and in the context of an information sharing agreement these companies are sharing detailed information about each other, and in the context of an industry where they're moving from one company to the other, meeting regularly, and in the context of a situation where plaintiffs have alleged that as a result of the "no poach" agreement there is less mobility than there otherwise would be; right?

So we don't have to prove that there's no mobility and no movement. What we have to prove is to the extent that there is an effect, that that effect comes from the agreement. Plaintiffs plead in paragraph 85 that as a result of the cartel's "no poach" agreement, growers very rarely switch integrators.

So plaintiffs have pled -- in effect, plaintiffs have pled direct evidence of at least one agreement, plaintiffs have pled industry observers' awareness of a broader set of agreements, and have plaintiffs have pled circumstantial evidence, including the information sharing itself, that lends more plausibility to a broader "no poach" agreement among all of the defendants.

THE COURT: So let's talk for a moment about how to apply *Twombly* to an allegation like the one contained in paragraph 80 of the complaint.

So paragraph 80 you've just directed us to, this is the discussion about the phone call with what's alleged to be a secretary at Peco. So I'm instructed to assume the truth of the allegations in the complaint at this stage, but what that means here, I think, in this context is, I assume that that conversation happened. But it's not evidence of an agreement between the integrators, is it? Even if I assume the truth of the statement, the words themselves, that there was such a phone call and somebody said that thing, is that evidence? Do I then go the additional step under *Twombly* and say, well, and then I conclude that the thing that was said was also true?

MR. CRAMER: Well, I think that in this instance, the circumstances of the conversation would require you, I think, to assume that both the thing was said and that the thing was true.

THE COURT: I think that's not a helpful argument for you, is it? Because if we look at the circumstances in which the statement was made, there are none. We have no idea who's made the -- expressed those thoughts, when, in what context, what information that person had. We can't -- there's nothing about the statement we can evaluate except that it was made.

MR. CRAMER: Fair enough. Fair enough. We would have to bring the person, the grower, who made the call or the secretary who made the statement into court and they'd have to

testify and there would have to be an assessment of credibility of the two witnesses, but that can't be done on a motion to dismiss.

One thing I would draw your attention on this point of Your Honor to is the Tenth Circuit's *Champagne Metals* case because there's a similar colloquy in that case that the court relies upon. So in *Champagne Metals*, you have this plaintiff upstart aluminum distributor, and it alleges that the established distributors have told all of the mills, the wood mills, that the distributors need -- or aluminum mills that the distributors need -- that if any of the mills deal with this renegade, new, upstart distributor, there will be a group boycott of the mills.

So what's the evidence of that? The sole piece of evidence that the Tenth Circuit says allows this case to go forward is testimony of a third-party mill operator who said, I got a phone call from one established distributor who said to me that if I deal with this plaintiff upstart distributor, the other unnamed, unspoken distributors will not do business with you.

I think that's similar; right? We don't -- we can't assess the credibility of the people involved. We don't know who those other distributors were. We don't know whether the distributor on the phone call was exaggerating for effect. We don't know any of that. But the Tenth Circuit says, yeah,

there's hearsay and there's lack of specificity as to the identity of the co-conspirators but the court said that's direct evidence of a group boycott. I think that that is instructive for a similar kind of allegation here.

THE COURT: So is the answer that you think that the way to apply *Twombly* to an allegation like this in a complaint is to assume both the fact that the statement was made and assume the truth of the representation or statement when applying that *Twombly* analysis to decide what allegations are going to survive to be evaluated for plausibility?

MR. CRAMER: I think that the -- I think that the only caveat -- the answer to that is yes, with a caveat. The caveat would be if there were reasons to disbelieve the statement, right, if the statement about an agreement just made no sense, right, or was out of character, or there was some facts and circumstances about the statement that an objective observer reading would say, now that can't be, that doesn't make sense in light of everything else the plaintiff have pled.

But here, that's --

THE COURT: I've understood *Twombly* to tell us -- the point of *Twombly*, I think, is -- that's not so. But one of the points that I extract from *Twombly* is that we don't want judges just exercising independent decision-making about what weight to give allegations in the complaint.

MR. CRAMER: Well, *Twombly* explicitly says it's not

a probability requirement; right? The judge doesn't have to determine that plaintiffs are probably right, just that they've made a plausible claim.

It would be weird for a secretary of a company to admit an illegal cartel agreement on the phone to a grower. Now, I guess that can be cut both ways. But it sounds like there was an agreement, otherwise why would she say it?

THE COURT: Well, this is one thing that I have studied or written on a bit in another case. But, I mean, it's the claim that has to be plausible, not the fact that's alleged. But that requires -- gosh, doesn't -- I don't know what to do with this.

I've said in other contexts, if there's a fact alleged and the fact itself seems implausible at the Rule 12 stage, you just accept the fact, you don't engage in some probability about the existence of a fact that's asserted, that's a Rule 11 issue.

MR. CRAMER: Right.

THE COURT: But I don't know what to -- this statement is just as easily explained by a misunderstanding or miscommunication or anything else as it is to be what it purports to be.

How do I -- how does that fit in the analysis? Is it not just given much weight in my mind when I'm evaluating the plausibility of the claim in view of all the allegations

together?

MR. CRAMER: Well, again, Your Honor doesn't --

THE COURT: What if the allegation was I was walking from the cafeteria to a conference room and I overheard two people in another room and heard this statement? We just assume that there's a conspiracy between -- an agreement between the companies because a statement was overheard by an unattributable person outside the context of a specific conversation?

MR. CRAMER: I think the further away you get from the participants in the conversation, the less likely it is that what the person heard actually reflects the conversation.

But in the context of this case, where paragraphs 81 through 84 elaborate on the observations of industry observers in government reports talking to the government or investigating these things and saying, look, it just appears like there's this unwritten rule that one integrator won't hire a grower from another integrator, there's a grower who moved into a region knowing that there was a bunch of integrators in that region and he said, I just can't move, they won't let me, and even when I want to at this point, Your Honor, I think that the plaintiffs should be able to get discovery as to that point.

Now, I think if Your Honor rules the way that you were leaning, I think we'd be able to get discovery as to that and

at some point, at summary judgment or trial, defendants will seek to refute it.

I agree with Your Honor, just to double back to the point that was made earlier, that on a 12(b)(6) motion the question is whether plaintiffs have stated a claim for relief. Plaintiffs have two claims here, a Section 1 claim and a Packers and Stockyards Act claim. If plaintiffs have set forth any set of facts that allow the Section 1 claim to move forward, then the Section 1 claim should move forward and then the question about what discovery should be and the limits to discovery is a secondary issue.

THE COURT: So here's the flip side of that issue in my mind. Let's go to our trade secret analogy again. I like that better than contract which we mentioned first.

Suppose a plaintiff pleads a viable trade secret theft claim on the basis of product formulation and then throws in the complaint wholly unsupported allegations about customer lists. For the purpose of engaging in discovery about customer lists, is that permissible? And remember, we're applying a different Rule 26 standard now than we used to apply so it is a little bit more narrow.

But when is the right time to have that discussion about what is the proper scope of discovery? Can you just bake into a case discovery on issues that wouldn't stand alone because you embed them in a claim that is otherwise viable on a

completely different basis?

MR. CRAMER: Well, I think in your --

THE COURT: I'm not saying that's what's done here. I'm just asking the question.

MR. CRAMER: Right, right. But your hypothetical implies some nefarious intent or nefarious purpose, and I think there would have to be good evidence of that.

I mean, here, plaintiffs have alleged a wage suppression scheme that the defendants have used two things to do. One, information share and reduce the incentives of parties moving because you're going to stabilize all the compensation; and two, in order to make sure there's very little movement, even though we've shared information and suppressed compensation, we're going -- and equalized compensation, stabilized it -- we're going to prevent growers from going from one integrator to the other. So there's a synergy between the two claims. It's not two completely unrelated things, they're related.

THE COURT: That's the argument the plaintiffs are advancing, right.

MR. CRAMER: And I think when you're making two related claims about the same entities dealing with the same group of plaintiffs and class members that affects the compensation of those class members in a similar way presumably, I think that it makes sense.

I mean, in fact, a lot of discovery -- the way that my opposing counsel described the discovery about Agri Stats was a little too crimped; right? Plaintiffs are going to be taking broader discovery than, what did you give to Agri Stats and what does that data look like? We're going to want much more information about what they talked about when they talked about the data, what they talked about when they got together, what other agreements do they have about the growers. That's all related to the information; right? It all flows from the information that they're getting.

We can stage discovery, right, we don't have to get it all at once. But once we start getting information relating to communications between the co-conspirators -- the alleged co-conspirators and the defendants, and if those communications start turning up "no poach" agreements or other kinds of agreements, then that becomes part of the case.

THE COURT: My guess is that Mr. Harkrider would agree with the last thing you said, and what I suspect he'd say is, well, then come back and see the court when you get evidence that somebody said, let's have an agreement, I won't poach your growers, you don't poach mine, then let's have discovery on it, but until there's some evidence to support that theory, let's not spend years discovering it.

But I don't know that you answered my question directly and I think I complicated it because I suggested some bad

intent --

MR. CRAMER: Right.

THE COURT: -- baking in a theory for a purpose. Let's forget the purpose. Let's just say it's there. I mean, the point here that I'm trying -- I pressed Mr. Harkrider on the unfairness to the plaintiffs. Let's press you on the unfairness to the defendants.

In that trade secret theory case, why do I get all of the defendants' confidential customer information because I've made a wholly conclusory allegation in a claim that will otherwise survive on a different basis, product formulation? And the defendants say, wow, that is extremely valuable and confidential, sensitive information and there's no basis to get it to you. You can't prevail on that theory, and if it was the only one you advanced, your claim would have failed.

What's the right tool in the toolbox? What's the right rule in which to have this discussion? Is it Rule 26? Is it Rule 12? 56?

MR. CRAMER: So I think it's not Rule 12. I think -- look, I don't want to give my opposing counsel ideas, but I've seen motions to strike allegations in complaints. I've seen a motion to strike class allegations in complaints. Now, typically they're not granted for various reasons, like there could be a Rule 11 motion. I don't think there's any basis for it. But there are various ways to deal with what a defendant

believes are improper or not well-pled parts of a complaint but Rule 12 isn't it. Rule 12 just asks whether plaintiffs have stated a claim for relief.

THE COURT: So suppose this case moves forward and I make a referral to a magistrate judge to resolve nondispositive motions in the case in a manner I hope that's consistent with the local practice here. The parties chose this forum for a reason, and you ought not have to deal with different approaches in different courts.

How does the magistrate judge go about evaluating what to do with the discovery requests for information about a "no poach" agreement, if I haven't made some ruling about it? It's liability. It's in the case. They look at the complaint, the magistrate judge does, and sees that there's an allegation about it, and the parties argue about whether it's going to be helpful or not. But don't those arguments essentially boil down to what we're talking about today, whether that theory is actionable? Do I have to answer that question in connection with this motion?

MR. CRAMER: I don't think you do, Your Honor. First of all, the discovery can be staged. For example, plaintiffs could seek discovery of the specific agreement alleged in paragraph 80. It could start there and maybe some other overarching discovery about communications between all of the co-conspirators relating to the data or relating to

growers; right? We're going to want communications -- if these guys -- if these defendants are talking to each other about growers, that's relevant to information sharing. It may also be relevant to "no poach." If, as a result of getting communications between rivals about growers, more information comes in regarding "no poach," plaintiffs should be able to develop that further. But, again, it can be staged.

We can start with paragraph 80. We can start with general discovery of communications between defendants about growers and the data that's being shared and the industry generally and it can be taken from there.

THE COURT: All right.

MR. CRAMER: So I think that's all I had, unless Your Honor had other items that you would like me to address. I guess I would say one other thing about "no poach." I would point Your Honor to a couple of cases.

In the *Dentists* case, for example, there was good evidence about "no poach" between two of the defendants in that case -- and I'm in that case -- but not against the third. The court let it go forward because there was good evidence about one, and in the context of the rest of the case the court let the "no poach" go against the third.

Or the *High-Tech* case, yeah, there were written agreements between -- six bilateral agreements between the defendants there, but what the court let go forward was an

overarching agreement that was not in writing based upon circumstantial evidence. So there is -- there is precedent for allowing a "no poach" to go forward in the context of broader claims of anticompetitive conduct is what I would say.

And with that, unless Your Honor has further questions --

THE COURT: Give me one moment, would you?

MR. CRAMER: Of course.

THE COURT: Okay. I think I will have some follow-up but let's reserve that for a moment.

And why don't we hear quickly in rebuttal, if there is some, and then why don't we take up the arbitration issue, which I think is more narrow than this one.

Mr. Harkrider.

MR. HARKRIDER: Hi again. I'll try and be brief.

First, I just want to address the issue briefly on information exchange with respect to the allegations in the complaint. They point to paragraph 121 and paragraph 77. The one thing that is missing in both of those is an allegation that they actually discussed grower compensation at those meetings. Paragraph 121 says, "Agri Stats hosts regulator 'poultry outlook conferences' for Integrators' executives, including an April 23, 2015, conference in Atlanta, Georgia." Nowhere does it say that they're talking about grower compensation. They could have been talking about anything at

that meeting.

The same defect is true in paragraph 77, where they say that CEO's have access to each other's production complexes, they talk with each other, there's a Chicken Media Summit. Fine. But nowhere does it say that they're talking about grower compensation.

And so, you know, the reason that matters is because -- and I know I'm not necessarily winning this point -- but the one key distinguishing factor between this case and the other cases is the absence of direct communications -- or allegations of direct, credible, specific allegations of direct communications between defendants with respect to Agri Stats. All there is is an allegation that people are subscribing to Agri Stats, plus a lot of opportunities for people to meet together. Certainly, they might have alleged, for instance, that people were talking about Agri Stats or grower compensation at those meetings but they did not.

If you look at *Lindseed* and *American Column,* both of those cases involve direct meetings between defendants talking about communications. In *American Column,* there are weekly meetings. In *Lindseed*, there's a requirement that you have to meet and discuss the information or you will actually be fined.

And then one quick point on *Intracorp.* What is being disclosed is the prices being charged by the chiropractors. That seems competitively sensitive. There's a recommendation

that is actually absent from this case that you shouldn't charge above a certain amount; in that case, 80 percent. Sure, will some people potentially go up to 80 percent? Fine. But what about those people who are in the 85th percentile? 90th percentile? 95th percentile?

And so simply put, we're not aware of and he still has not -- or counsel has not alleged any case that involves purely vertical agreements between -- between -- between companies and a third-party service without actual allegations with respect to the various defendants.

I will grant you that there are hub-and-spokes, there are lots of different hub-and-spokes out there, and Toys R Us is a totally different category. But *Total Benefits* talks about what is entirely missing in that case -- and that's why they dismiss it -- is that there is no -- all there are are these vertical relationships, there is no rim connecting everything.

THE COURT: And Mr. Cramer says that the defendants have not identified a case where each of the three *Todd* factors are satisfied and a court dismisses the case at a Rule 12 stage.

MR. HARKRIDER: I think *Intracorp* -- I actually think -- well, so *Intracorp* is, you know, with all transparency actually a summary judgment case, it's not a motion to dismiss. Although, I think in this case that actually cuts in our favor

because after all the discovery they still don't have it, meaning that -- it's unclear, I guess, a little bit what was actually alleged in the complaint to be fair. But in *Intracorp*, they are exchanging -- it's price information that's sensitive, it's current information that's sensitive. So I would say that those factors are met.

And there are a lot of other cases out there, *Maple Flooring*, etcetera, that are dealing with exchanges of information that are found to be procompetitive.

THE COURT: I just wonder -- I guess I already asked you this question and I heard your response, but it seems to me that the devil's in the details, that these arrangements are not inherently unlawful or anticompetitive but that they could rise to that level in the correct circumstances.

MR. HARKRIDER: Right. Which actually takes us to the next point, which is whether this is such a circumstance.

And so I think if you look at paragraph 169 of the complaint, they allege that this scheme is a per se violation of the Sherman Antitrust Act, which might have been why we were all confused as to whether we should or should not say something about the rule of reason.

We do think that there are cases out there -- I think *Petroleum Products* might be one of those cases in the Ninth Circuit at the district, I think -- that deals with whether you should be striking sort of allegations with respect to claims

that are -- you know, if -- we should at the very least not be allowing this claim to, you know, go forward on a per se basis because rule of reason does seem to be the operative procedure here.

And I think with respect to whether this is --

THE COURT: Will that depend on whether or not I ultimately conclude the "no poach" agreement is plausibly pled?

MR. HARKRIDER: Yes, absolutely. And I'll get to that in a minute. You're absolutely -- you're absolutely correct.

And so, you know, let's look at what's being alleged with respect to market definition to see whether it does satisfy, you know, the plausibility standard of relevant market. My opponent says, well, you know, integrators could pick up and move to where the growers are or growers could pick up and move to where the integrators are. The problem with that is that they actually plead the opposite. They plead specifically that the integrators in part because -- I'm sorry, not the integrators -- but the growers in part because they're in so much debt are unable to move, that they are not able to act in a manner that is responsive to demand and to prices. And, again, the obligation to build the houses and the obligation to build the houses to specifications, that costs them a lot of money. Nowhere is that alleged to be part of a conspiracy; that's unilateral conduct.

And so in paragraph 90, they allege, I believe, the integrators -- that there are high barriers to entry for the integrators, and so it wouldn't make sense that the integrators would move to another part of the country where growers would be.

And in paragraph 133, they allege that the growers have high barriers to entry so it doesn't make sense that the growers would move to other parts of the country.

THE COURT: So this conversation started a few steps in front of me --

MR. HARKRIDER: Yes.

THE COURT: -- to begin with because of the briefing. In your reply brief arguing relevant geographic market --

MR. HARKRIDER: Correct.

THE COURT: -- you cite to the *Cinema Village Cinemart* case from the Second Circuit.

MR. HARKRIDER: Uh-huh.

THE COURT: You cite us to a district court case out of Texas.

MR. HARKRIDER: Uh-huh.

THE COURT: There's a footnote citation to a Fifth Circuit case, and then there's a citation to a district court decision out of Kansas.

MR. HARKRIDER: Correct.

THE COURT: I guess my question is what case you would point us to, if any, for controlling authority in the Tenth Circuit about the pleading requirement for a relevant market, if you know one, if there's a Tenth Circuit case that talks about it; and if not, are these the cases that you think control?

MR. HARKRIDER: So I think probably two separate points. First is that I can certainly point you to authority that you need to allege a relevant market under a -- under a -- under a rule of reason case. I think that's actually sort of black letter law.

THE COURT: Let's assume that's true. You say that -- I mean, there is a relevant market pled here.

MR. HARKRIDER: Right. But it needs to be a plausible relevant market. And so --

THE COURT: How do I evaluate that in the Tenth Circuit?

MR. HARKRIDER: Okay. So I think you evaluate that based upon the actual allegations that they've pled and take them for the truth of what they've pled. What they've pled repeatedly are local networks, they've pled that you can only switch if you have somebody close by, they've pled that there are high barriers to entry for both the growers and the integrators, and they've pled that the growers will not switch in response to changes in price. All of those allegations,

plus, in fact, the fact that there are two or three other cases out there that directly deal with the issue of, you know, how local is this market, plus I think you can almost take -- I don't want to say take judicial notice of the fact that it's probably hard to, you know, transport poultry across the United States. It just -- I think all of that, plus *Twombly* in some sense on the question of just plausibility, is it plausible that there is a nationwide market for poultry, you know, for growout services.

THE COURT: If the case proceeds, your expert will likely -- on this point will likely be an economist?

MR. HARKRIDER: Yes, I believe so. Correct.

THE COURT: And I suspect the plaintiffs will have an economist who will have a different view. And so at a Rule 12 stage, am I supposed to act as an economist and make a judgment about what's plausible and not plausible?

MR. HARKRIDER: Right. So imagine, for instance, that they had alleged that the market was the state of Oklahoma or that it was three counties, and we said no, no, no, Your Honor, it's five counties; or it's not all of Oklahoma, it's part of Oklahoma. I think you would be absolutely correct.

I think if what you're talking about is, you know, two facially plausible market definitions, sure, that is a factual question. But if you're talking about a market definition that is implausible on its face -- I think that's the *Drake v. Cox*

Communications case, which is dealing with local PSA announcements. Obviously local PSA announcements are not national, there's no national market for that.

THE COURT: Okay.

MR. HARKRIDER: And so I think we're not asking you to act as an economist. We're simply saying that the test we all agree upon is that in response to a price change, will somebody go to another part of the country? That is implausible on its face given the allegations of the complaint, including the allegation that people will not move in response to press changes where they're in so much debt.

So I think you can -- I think at the -- of course, there are going to be factual questions and close cases and that is absolutely correctly not on a motion to dismiss, but this is not a close question.

THE COURT: And for the authority, the standard, that applies here, you've given me the cases I should rely on?

MR. HARKRIDER: Yes. Yes, I believe so.

THE COURT: Okay. And Mr. Cramer's argument -- Mr. Cramer's argument that here they need not even plead a relevant market because of the anticompetitive effects?

MR. HARKRIDER: Yes. So, first of all, *Campfield*, which is 532 F.3d 1111, is a Tenth Circuit case just saying that you need to have rule -- a relevant market in a rule of reason case, just to get that point out there. That was one of

the first points I made.

Okay. Moving to the issue of proof of actual -- or allegations of actual anticompetitive effect, I would suggest we again look at the allegation in the complaint which I think is a governing document. And their allegation, I believe, in 151 is that since 2000 the inflation-adjusted market price of broilers has grown while the share has fallen, and then they say that in 2007 it's been a significant downward trend. They don't actually allege that the trend has accelerated. They simply say -- and it would actually follow and makes sense if it's been falling since 1980, it's probably continuing to fall.

If you look at these allegations -- for example, in paragraph 152, they say that in the Oklahoma State University budget for growers published in 2006 shows negative annual returns between 1990 and 2009. So if they're going to say that it's tough being a grower, I'm sure it's tough being a grower. If they want to say that prices have fallen since 1980, I'm sure -- I'm going to take these allegations as true. If they're going to say that between 1999 and 2009, that there have been declines in grower compensation or negative operating margins, however they want to characterize it, I'm sure that's all true.

But the two things that are really missing here are, first of all, because they failed to allege that there was a change -- a specific date on which the information sharing

occurred -- you know, started, if it started in 2008, how are you connecting these changes to something that happened in 1980 or things that happened between 1999 and 2009? There needs to be an allegation of actual anticompetitive effect.

I would suggest that it should look something like *In re Text Messages,* which says that we met on this day and then, you know, there was a dramatic increase -- there was a meeting on a certain day and then a dramatic increase in the prices thereafter. That's what's missing here. What they're showing are trends that occurred -- that started beforehand and continued afterwards, but what they're not showing is that there's a break in those trends.

I think that that's very different than the dental case which was, among other things, a quick-look boycott case where they're actually talking about the fact that insurers couldn't get X-rays. I mean, there's a policy that said you can't get X-rays, and then after the adoption of the policy that said you couldn't get X-rays, you couldn't get X-rays. I think that's very different than saying, you know, for the last 30 years people haven't been able to get X-rays, and then there was an agreement five years ago and you still can't get X-rays. Okay. But you have to show some plausible connection, some nexus, between the alleged anticompetitive impact and the actual conduct.

That's why I kept on pressing, you know, for example,

Your Honor when you were saying, well, in paragraph 80 with respect to *Peco*, when did this actually occur? You don't know when it occurred. Well, what else you don't know what occurred is you don't know when the agreement occurred with respect to information sharing. Was it 2008? Was it 2007? Was it 2006? Was it 2012? We don't know. We know it was somewhere around 2008 maybe, maybe before, but we don't know exactly when.

And so the point I'm trying to make is, especially if you're going to say, you know what, I don't need to define a relevant market, I just need to have impact, okay, then tie the impact to the actual event, show that there was -- or allege that there was some break, some change, you know, as a result of -- as a result of the behavior.

I think that that's actually, you know, what's almost entirely missing in this case is a specific date. Just like in *Peco*, we don't know the what, the where, and the when. We don't know, you know, was this between Tyson and Peco and wherever that secretary was? And where was that secretary, you know, what district? You know, if you're going to take the truth of the matter asserted, you still don't know exactly where it was or who else was in that agreement. You don't know if it was, you know, for a year. You don't know if it was at a specific, you know, point in time. So I think if you map that over to what's actually missing in the information exchange, I think that that's -- I think that that's quite telling.

There are cases that hold, in fact, that if you're going to be relying upon changes in conduct, you need to tie -- you need to not only know what happens after, but you need to know what happens before. You need to show that there's actually, you know, essentially a break in behavior. That is, I think, you know, what's actually missing here.

I just want to take a quick moment on this broad discovery point. So, first of all, I'm not against the proposal that you actually correctly telegraphed that I would not be against, which is that they -- if the information sharing goes forward, they should go forward in information sharing, and if something that they learn suggests that there's something with respect to "no poach," then maybe they can go after "no poach." But we should at least start and everything should be contained to information sharing.

I don't think we should underestimate how broad the potential discovery is with respect to "no poach" because it takes you to every part of the country to ask not only what were the switching rates, but who switched, when they switched, why they switched. It's a highly individualized inquiry that's very fundamentally different than maybe I'm trying to cabin in information sharing and maybe inappropriately. But certainly the information sharing through Agri Stats is about what you shared with Agri Stats and what that impact was on the marketplace. Those are fundamentally -- you know, those are

fundamentally different -- you know, fundamentally different inquiries.

So I guess that might be what I wanted to say, other than the fact that in paragraph 166 they specifically allege, you know, essentially two different -- you know, two different agreements, it's "no poach" and it's information sharing. That's paragraph 166.

So the idea that Your Honor could issue an opinion saying, okay, 166(a), you know, can go forward but 166(b) cannot; or, frankly, that this is a rule of reason and all they've alleged is per se and so Count 1 is gone, you know, would both be fine with us, if one wanted to go forward with information sharing, which we think is facially defective because of a lack of specific allegations that defendants met and discussed, lack of specific allegations that after the date that it occurred that there were price changes, and lack of specific allegations as to relevant market, all three of which are independently fatal defects.

THE COURT: Thank you, Mr. Harkrider.

Mr. Cramer, briefly in response. Go ahead.

MR. CRAMER: Yeah, briefly there were a couple points that I just wanted to hit.

A point that Mr. Harkrider made repeatedly is that plaintiffs, I assume in any antitrust case, cannot show any competitive effect or an effect of the conduct unless they can

show some kind of market shift, some kind of market change after the conduct was alleged to have been initiated.

Now, I would submit that certainly it makes causation proof easier if there's a market shift. But believe me, if plaintiffs were up here putting up an economist and argued there was a market shift, it was around the time of the anticompetitive behavior, therefore, there's causation, these guys would get up and object and they'd put up an economist who would say what? He would say, no, no, you need to run a regression to show causation. There are all kinds of other things going on and you need to rule out all those other causal factors. In order to prove causation in any antitrust case, you almost always need a regression.

And what would plaintiffs do here? They would run a regression to show that the information sharing had an effect on suppressing compensation of growers.

Now, the defendants say we didn't allege an effect. We did allege an effect. We alleged that as a result of the information sharing and other conduct alleged in the complaint, the growers' compensation was lower. In fact, as I pointed out, and it was not responded to, not only did we allege it, it was admitted. The defendants don't deny that they take the information gathered nationally, used nationally to suppress their costs, to lower their costs, major costs of which being grower pay, grower compensation.

The question about causation is not actual versus actual; it's actual versus "but for." We have an actual world with the actual conduct and the actual pay and then we need to look at the "but for" world. Without the bad conduct, what is the pay? And what plaintiffs allege and will prove is that absent the illegal -- allegedly illegal information sharing and other illegal conduct, including "no poach," that grower compensation would be higher but that takes economic analysis. Certainly we've alleged enough in the complaint to make that plausible. There's no case that says one needs to demonstrate or allege a change in behavior after the conduct.

Plus, think about it. Here, we have conduct that went on for a long time. We don't actually know how long it went. What that would mean is that if one discovers anticompetitive conduct that has been going on for a long time and either inflating prices or suppressing compensation for a long time, and we don't know when it began and it hasn't yet ended, I assume the defendants would say, well, then there's just no way to prove harm because you can't show a change.

The point is, there are ways that we can show change, there are ways that we will show change, and we certainly alleged an anticompetitive effect here.

Second point I would make on the relevant market, we certainly alleged and pled a relevant market. I think there were some discussion of the SSNIP test, which is small but

significant increase in price -- non-transitory increase in price, and in this context it would be a decrease in price. Basically what that means is that if a defendant in a market -- if a company in a market can suppress compensation a small amount below competitive levels for a significant period of time and that would cause people to move to some other company, then both of those companies are in the same market. If one can suppress prices below competitive levels and it would not cause people to move, then that second company is not in the market. It's just a test, an economic test, to see whether two companies are in the same market.

And yes, it's true, plaintiffs allege that mobility is difficult due to all the things that plaintiffs allege in the case. But, number one, it's not impossible, it's reduced, it's suppressed as a result of the "no poach" plaintiffs allege.

Paragraph 135 is a good example of that. Plaintiffs allege that absent the "no poach" and absent the information sharing, there would be mobility and movement if the defendants attempted to suppress compensation below competitive levels, a SSNIP, people would move. That's the allegation.

And second, we don't need necessarily people to move. We just need new people to decide to move into areas with high compensation. I've never been a farmer before. I've lived on my family farm. I want to start a farm. I'm going to start my farm where there's high compensation, not low compensation;

right? And if those -- if that's an economic fact and there is no cartel, then companies in different regions, integrators in different regions, would compete over grower services, especially for those they think that will be good growers, and pay more in those regions. That would prove a national market.

If may be that there are regional submarkets that operate as regional submarkets and if you control the regional market that can allow you to suppress compensation; but if you expand it to include nationally, you can suppress compensation further. So you could have regional submarkets and a national market. You can have a lot of power regionally. That could give you power to suppress compensation. And then if you expand it even further, that could give you power to suppress competition even further. That would prove regional markets and national markets. But, again, the complaint has been pled sufficiently to allow for either result but certainly for the pled national market.

The defendants, one case that they've cited -- they have one case -- that a court dismissed because the market was alleged to be too broad, the *Drake v. Cox Communications* case. That's the only one. Every other case they cite, if the case was dismissed for some reason on relevant market, was because the plaintiffs gerrymandered and tried to make the market too narrow.

What is the *Drake v. Cox Communications* case? It is a

per se antitrust case in which the court said that nowhere in Drake's many pages of complaint, response, and unauthorized sur-replies is there any intelligible definition of the relevant market within which Cox and the Ad Council has supposedly acquired monopoly power.

So you have -- the only case that they're relying on that we've heard both in the rebuttal and in their first speech is a per se case in which the plaintiff didn't really even define a market at all, let alone a relevant market, that complied with the pleading standards. So that case, I don't think, can tell us very much.

And then the final thing I would say on information sharing agreements and the discussion of what it takes to show an agreement among competitors to share information, what I would point -- and my opposing counsel's argument that in *Lindseed* and some of the other cases there is evidence that was discussed in those cases because, after all, most of those cases are post-trial or post-summary judgment, not motion to dismiss cases. But there's evidence in those cases that the information that was being shared, in particular the prices, were being discussed at those meetings. Okay. So that is true.

But I would say, number one, here we're at the complaint stage and plaintiffs have alleged meetings that Agri Stats organizes. It's certainly a fair inference at this stage

that the kinds of information that Agri Stats is distributing is being discussed at Agri Stats meetings and the other meetings that are being held. That is a fair inference. I think that should be drawn at this stage.

And then, secondly, even if they never met and even if they never talked about the information, remember, the courts have said that it's the exchange of information itself that constitutes the agreement. *SRAM* said that. *Container Corp.* said that. They don't have to talk about it. If I give information expecting to get my rival's sensitive internal information in return, that's an agreement, end of story.

I think that's all I had to say, Your Honor, unless you have any further questions.

THE COURT: I don't but that's helpful. Thank you.

MR. CRAMER: Thank you.

THE COURT: I know we're going to keep marching today, but you've all figured out from last time you should bring snacks in your bags. Let's take a few minutes, let's take ten more minutes, and come back and hear about arbitration. Thank you.

(Short break)

THE COURT: Immediately upon returning to Salt Lake, I'm going to have stairs installed at our courts so that you can leap up the stairs into the courtroom. It feels momentous.

All right. That was super helpful, if it was long.

Let's take up the arbitration issue, much more briefly, I think. I think the beginning and end of the arbitration discussion might be the effective vindication doctrine. It looks to me like we have a valid arbitration agreement. I don't see that the 2017 addendum does anything to affect the validity of the underlying agreement. It's not clear to me but -- I mean, it's a question of contract interpretation. It appears to me that the arbitration language itself does not address these kinds of claims. But even if it does, and assuming that the arbitration provision is otherwise valid, I don't see how it survives the effective vindication doctrine.

It seems to me the Fourth Circuit case that the defendant, Perdue, relies on is distinguishable. I thought it was -- it seemed important to me that in the papers Perdue didn't address what I thought is the core of the problem here -- and it was squarely presented by the plaintiffs in their papers -- this arbitration provision eliminates the availability of injunctive relief, punitive damages, and attorneys' fees, and those are significant. This isn't the Fourth Circuit case, where there were restrictions on the discovery that might be available or the statute of limitations issue which might affect the award of damages that would otherwise be available.

I mean, here, this agreement prohibits any injunctive relief in the arbitration and the statute says you can get it,

and the same with treble damages. It seems to me Perdue cites no authority, not a case that we could find, where an arbitration provision with those restrictions in this context survived.

But assuming I'm wrong about all of that and that the arbitration provision does apply, it's unclear to me what we do about it here. I mean, it seems that the relief that Perdue is requesting is untethered to the result it would yield from the invocation of the arbitration agreement. I don't see how it means that Perdue is suddenly out of the case or entitled to a stay case-wide. I mean, the claims are going to move forward. There are other growers who claim they've been hurt by Perdue for reasons having nothing to do with any contractual relationship and vice versa.

There's a management issue in my mind. Theoretically, hypothetically, we could have a thousand parallel arbitrations moving on discrete similar claims and have all the core claims here still moving forward with all the same parties, and I don't think that's -- I don't think that's what anybody wants.

So let me invite you, Mr. Gordon, if you wish, to address those issues since it's not a helpful at least initial orientation.

MR. GORDON: Thank you, Your Honor. I think there is a solution to the problems that you identified. I think the solution that is sort of required by the validity of the

arbitration agreement and the procedural posture in which we find ourselves is that Nancy Butler cannot proceed with claims against Perdue. I think that's important because it upholds the validity of the arbitration agreement and it also is important for the context of this case because it goes to our suitability as a class representative. It could go -- and I think because of the nature of the discussion we just had, this seems to be a case where you could end up with multiple classes because of local geographic markets. Because of the effect from the information sharing agreement, if that's the basis we go on, the compensation paid to various categories of growers could be something where you need multiple classes or subclasses. The fact that she's waived her --

THE COURT: Contract claims.

MR. GORDON: No. I think she could proceed with her statutory claims as well. I mean, the arbitration clause says statutory claims.

THE COURT: Okay.

MR. GORDON: And she's also waived her ability to proceed as a class plaintiff, and Judge Payne in this court has upheld those kinds of provisions.

So it seems to me the sensible way to proceed, based on the issues you've raised, is to block, strike, dismiss her claim as to Perdue, allow her to proceed otherwise. When we get to class cert, we'll have to figure out what that means on

the effective vindication doctrine, if she's allowed to proceed against the other defendants, the ability to obtain injunctive relief -- I mean, if she wasn't in the case, the court could issue an injunction against Perdue so I don't think the effective vindication doctrine alters that. Same thing for attorneys' fees and damages. But I do think it goes very much to her --

THE COURT: Wait. Pause. I'm sorry.

MR. GORDON: Yes.

THE COURT: I want to make sure I understood what you just said.

Did you just say that the effective vindication doctrine doesn't bar Perdue's application -- or invocation of this arbitration agreement with her because other plaintiffs not named Butler can get that relief, injunctive relief?

MR. GORDON: The concern of the effective vindication doctrine is that a plaintiff's ability to pursue a statutory remedy is blocked. That's the purpose of that.

THE COURT: Is to ensure that it's not you mean?

MR. GORDON: That the statutory right is not blocked.

THE COURT: Right.

MR. GORDON: Right. Ms. Butler's ability to obtain statutory relief against other defendants is not blocked based on --

THE COURT: Is there a single case, that you're aware of, where the ability to obtain that relief against a third party prevents the invocation of the effective vindication doctrine with respect to the party who's invoking the arbitration?

MR. GORDON: There are certainly cases, Your Honor, where the courts -- and we've cited them -- where the court excised certain claims and directed those to arbitration. And if Ms. Butler wants to proceed against, you know, Perdue in arbitration, she could do so. And she could also proceed here --

THE COURT: No. Is the point -- I'm sorry. Maybe I misunderstood what you said.

The fact that Ms. Butler could get injunctive relief against Tyson, say, means that she -- the effective vindication doctrine doesn't apply here with Perdue?

MR. GORDON: Unless Your Honor is going to stay the whole case or dismiss the whole case -- I mean, Mr. Haff, who is not a Perdue grower, is going to proceed in this case and he will be able to obtain, if the court determines it necessary, injunctive relief as to Perdue so that --

THE COURT: So the point that somebody else, who may or may not pursue the claim on her behalf, could obtain the same relief or related relief means that we shouldn't apply the effective vindication doctrine? Is there a single case that

you're aware of where a court has relied on that?

MR. GORDON: The concerns -- there are -- as I said, there are cases where the court has excised certain claims to arbitration and allowed the class-action proceedings to continue as to others. And that sounds like that's where you're headed here. I.

Think that Ms. Butler's rights in that instance would be vindicated. I mean, her statutory entitlement to injunctive relief will not be stopped if she cannot proceed against Perdue, but I think it may go to her ability to serve as a class representative and I think that's important.

THE COURT: I'm sorry if I'm being dunce. I think I understand what you've now twice told me, and I agree that there are cases where courts separate claims and some go to arbitration and some remain viable in a case.

I'm asking, is there a single case, that you're aware of, where a court has said, oh, we don't worry about your effective vindication of your statutory rights because you may end up with that same thing because somebody else is going to go get it for you?

MR. GORDON: I am not aware of a case having to deal with that issue. I'm not aware of a case sort of getting teed up in the circumstances we find here as well.

THE COURT: Let's suppose for a moment hypothetically that's not an available theory. Is an

arbitration agreement that expressly prohibits the availability of injunctive relief, is that an issue under the effective vindication doctrine where the statute expressly says you can get it?

MR. GORDON: Your Honor, in *Italian Colors* and *Concepcion*, I mean, the Supreme Court in both those instances found that the fact that a claim might not be worth pursuing individually, not in a class context or not having all the remedies available in a court proceeding, did not mean that the statutory right was blocked and that the statutory right could not be effectively vindicated.

THE COURT: What about injunctive relief?

MR. GORDON: Well, an arbitrator can never have the power to order the same means a federal district court judge does. I mean, they could -- so, I mean, I think that's always the case when you've got arbitration.

THE COURT: I'm not sure about that. I wondered about that, thought about it in preparation for this hearing because the arbitration award is usually presented in federal court for approval and invocation and enforcement.

But there can't be any injunctive relief here available to Ms. Butler at all, here, there, or anywhere, under your agreement that doesn't -- and the statute expressly provides for that right. So is that -- is that a statutory right that Perdue's taken off the table?

MR. GORDON: To the extent that the court finds that is -- that right, that procedural right, is necessary to vindicate the substantive right -- and I would argue that it's not -- but to the extent that the court finds that it is, the court can excise that portion from the arbitration agreement.

THE COURT: I should modify the agreement?

MR. GORDON: There is a savings clause in the agreement, and we've cited a bunch of cases where the courts have done that.

THE COURT: And what about attorneys' fees? How about treble damages? The Fourth Circuit case talks a little bit about damages and whether that is sufficient, but treble damages serves a different purpose under the statute. It's available to Ms. Butler but it serves a bigger purpose. It's not available here under the arbitration agreement.

Is that an issue under the effective vindication doctrine?

MR. GORDON: In *Italian Colors*, Justice Scalia calls out that the treble damages provision is something that might be saved or is something that might be an issue.

So, again, as to, in this instance, that is something that the court could -- I don't think it needs to. I think it's a procedural right. I mean, the Sherman Act is independent of the Clayton Act. The Sherman Act, which is the substantive right to be vindicated, is independent of the

Clayton Act which provides for treble damages and attorneys' fees.

THE COURT: So you mentioned a moment ago this difference between substantive and procedural rights and you suggested that injunctive relief is a procedural right. So what is it that you think would be a substantive right?

MR. GORDON: The claim. I mean --

THE COURT: That's it; right?

MR. GORDON: That is the substantive right.

THE COURT: So why are there other cases talking about these other issues if they're not even at issue in the effective vindication doctrine?

MR. GORDON: I think a lot of those issues arise from the facts of those cases. Several of the effective vindication doctrine cases were payday loan cases or involving Indian tribes. The *BMO Harris* case, for example, where the choice of law provision, which would seem like a procedural issue, essentially vitiated the plaintiff's claims because the choice of law provision provided that the choice of law would be tribal law which wiped away truth in lending -- the Truth In Lending Act and state usury laws, so that essentially the choice of law provision substantively, which would, again, seem to be a procedural right, vitiated the ability for the plaintiff there to vindicate her rights.

MR. CRAMER: Is injunctive relief an equitable

remedy?

MR. GORDON: Yes.

THE COURT: Why do we think that the language in the arbitration provision in the contract applies to these claims? What section of the agreement will we turn to for Ms. Butler to vindicate her claim that Perdue engaged in a conspiracy to suppress grower compensation?

MR. GORDON: The agreement on its face says all claims, including statutory claims.

THE COURT: Well, it says two different things, doesn't it? I mean, I really think the -- one of the issues that I think is at the forefront of this discussion is what to do with the language in Section VI and the language in Section VII which I read to be different.

MR. GORDON: Are you talking about VII or --

THE COURT: Yeah, VII-B. You like that language, right?

MR. GORDON: I do.

THE COURT: Because that is everything between us at all times here and forever forward and it's like marriage. But --

MR. GORDON: A noble institution.

THE COURT: -- doesn't that have to be read in concert with Section VI and VI-A? VI-A seems like it -- and both parts of VI-A in its face -- in fact, the opening

sentence -- says that the procedures we're about to talk about apply in this section and Section VII below, and then there's language that follows that is tensioned with the language in VII-B. It's a legal question. How do we resolve that tension?

MR. GORDON: I don't see the tension. I think the agreement contemplates certain, I would call, sort of ministerial disputes being resolved, you know, through consultation with the flock adviser and circumstances like that. But the arbitration provision, I think, you know, contemplates more grievous, more serious disputes being resolved through an arbitration proceeding.

THE COURT: So let's read together for a minute.

Section VI styled "Complaint Resolution Procedure": "The procedures in this Section VI and Section VII below shall govern any and all complaints or disputes between Perdue and the producer arising out of, as a consequence of, for or by reason of, resulting from, or relating in any way to the formation, execution, performance, termination, revocation, cancellation, or expiration of this agreement."

Do the plaintiffs' claims in this case fall within the scope of that language?

MR. GORDON: I don't think they do, Your Honor, and that's why we didn't invoke it.

THE COURT: Okay. So I don't think they do either.

MR. GORDON: Okay.

THE COURT: So then what do we do with the language that's at the beginning of that paragraph, that the procedures in this section and the one that follows shall govern and then the description about to what Section VI and Section VII will apply?

MR. GORDON: I think for agreements that arise out of the contract that are suited to the procedures set forth in Section VI that would apply, that is not what we're here about. We're here about a statutory claim. The language in Section VII says that it's not limited to claims arising out of the contract.

THE COURT: Right, right. Section VII-B has that parenthetical.

MR. GORDON: Correct.

THE COURT: What do you make of that, that it's in parentheses?

MR. GORDON: I mean, I think that's drafted to try and add clarity.

THE COURT: Okay. And what about the opening clause of Section B, "except as provided herein"? So Section VI is provided herein in the agreement, that language we just read describing the procedures that would apply to both Section VI and Section VII?

MR. GORDON: Correct.

THE COURT: So that clause, "except as provided

herein," does it not reach back to Section VI?

MR. GORDON: I think it does, to the extent that a claim under -- where a claim arises out of the contract and would be governed by the procedures in Section VI. I think it's easy to read them consistently, not inconsistently.

So, in other words, Section VI would deal with claims arising out of the contract. Section VI and VII deal with claims arising out of the contract. Section VII deals with claims that do not arise out of the contract.

THE COURT: And that would be clear to any grower, I guess, reading this agreement?

MR. GORDON: Well, the other issue, though, Your Honor, is that Ms. Butler had the opportunity to opt not to follow these procedures. I don't think any of the cases that the plaintiffs have cited here dealt with the situation where the person who was challenging the arbitration provision had such a clear and obvious means of opting in or opting out. It's not a situation where she had 30 days to opt out afterwards and she forgot about it. I mean, it was presented take option A or option B, and she took option A and that choice should be respected.

THE COURT: So I think what you're saying -- I think I understand. Your position is, Ms. Butler's claims in this case have nothing to do with this contract but they're barred by Section VII-B?

MR. GORDON: They are barred by the arbitration provision, correct, Your Honor.

THE COURT: There's no -- in a breach of contract case with Perdue, Ms. Butler wouldn't go looking somewhere in the contract for the contractual obligation that Perdue breached?

MR. GORDON: I'm not sure I follow you on that one, Your Honor.

THE COURT: I think I know the answer to that question. I'm piling on. You answered the question when I asked you about the scope of Section VI. Your answer and mine are the same.

MR. GORDON: Okay.

THE COURT: I think her claims don't fall within VI-A.

MR. GORDON: No. I think if you look at the Tenth Circuit opinion in the cable television box litigation, where the court enforced a provision in the Internet services agreement to deal with a complaint about cable boxes, the plaintiffs' complaints predated the execution of the Internet services agreement and the equitable complaint wasn't about Internet services, it was about the cable box. But because the clause there was brought, as it is here, the Tenth Circuit enforced that provision, even though the claim predated the execution of that service agreement and was beyond the

agreement in which it was contained.

THE COURT: Okay. I think I understand and I think we've touched on all three of the main points that I had hoped to visit with you about. Is there anything more that you wanted to tell us about the arbitration provision?

MR. GORDON: I do think it's important to enforce the provision as to Ms. Butler's claims against Perdue and her ability to serve as a class plaintiff as to Perdue. I mean, she had a choice to waive those and she did. For the reasons we discussed earlier, I think the effective vindication doctrine really doesn't come into play here because she'll have the ability to vindicate her statutory rights but I think it does go to her adequacy as a class representative.

THE COURT: How many growers have agreements with arbitration provisions like this with the integrators; do you know?

MR. GORDON: About 60 percent.

THE COURT: And how similar do you think the arbitration provision language is in those agreements?

MR. GORDON: Very.

THE COURT: All right. Thank you.

MR. GORDON: Thank you.

THE COURT: Ms. Coolidge. So Section VI and Section VII-B should just be read in harmony together and one applies to the procedures and disputes that arise under the contract

and the other bars everything else for time and eternity and that's okay, and so there's no problem, and Ms. Butler can get vindication of all her statutory rights through other plaintiffs or other defendants?

MS. COOLIDGE: So for your first point, Your Honor, it's not that clear to me that the dispute resolution procedures don't apply. The last clause that wasn't read in the court is saying, "or any provision, including, but not limited to, all common law, equitable and/or statutory claims."

So it seems to me that Perdue was thinking any dispute first starts with complaint resolution with someone who's specialized in the grower industry and then it goes to arbitration as sort of an escalation up from that.

THE COURT: But that clause -- I'm sorry to interrupt -- that clause, the "including, but not limited to," isn't that a narrowing of the general language that precedes it? So we already know from the language above that we're only talking about claims that are a consequence of, or resulting from, or relating in any way to the contract included. So that word "including" doesn't expand the earlier clause, does it?

MS. COOLIDGE: No, Your Honor, it wouldn't. It's a fair reading. I'm not sure that it matters for these circumstances. I think what matters is what Your Honor started with, which is the arbitration clause isn't enforceable because it is a prospective waiver of Ms. Butler's statutory rights,

and in particular, her right to equitable relief, her right to treble damages. I am also unaware of any case that held that because somebody else can vindicate your rights for you, that means the effective vindication doctrine doesn't apply to your claims.

THE COURT: Why are the attorneys' fees provisions and treble damages provisions at least not more like the Fourth Circuit case? I mean, why isn't that really just a question about the availability of damages?

MS. COOLIDGE: In *Italian Colors*, Justice Scalia specifically cited to the fact that, you know, it may be okay to prevent a plaintiff from leading a class-action, but treble damages are an important and endemic right within the Sherman Act, the Clayton Act for private parties to be able to seek those rights and those couldn't be waived. I think it's just the same as the injunctive relief.

Perdue's arbitration clause purports to take any ability for Ms. Butler to actually obtain relief under the antitrust laws that Congress set forth for her to do so and eliminates those rights prospectively and illegally.

THE COURT: Could the parties contractually agree -- let's set aside for the moment the question of these claims proceeding in arbitration. Let's suppose they're in court. Could the parties contractually agree that as between them neither will maintain an action to seek recovery of attorneys'

fees or treble damages or injunctive relief for any reason?

MS. COOLIDGE: I don't think so, not if it eliminates a statutory right. I think the case law is quite clear, both at the Supreme Court level and in multiple cases and in the Tenth Circuit, that there are certain rights that cannot be waived prospectively and you cannot say, I hereby forego the rights Congress has given to me.

THE COURT: If the arbitration provision applies to Ms. Butler's claims in this case, where does that leave us? What relief is Perdue entitled to?

MS. COOLIDGE: Not much. Each of the other class representatives will continue their claims against Perdue, Ms. Butler would continue her claims against the other defendants, and so not much will have changed except for potentially some wording around who Ms. Butler purports to represent and who she can bring her claim on behalf of -- or against. I'm sorry.

THE COURT: Mr. Gordon says that if we enforce the arbitration provisions, at a minimum she can't be -- she's not a suitable class representative because she can't maintain the class claims at least as against one of the defendants. What say you?

MS. COOLIDGE: I think that's an issue for the class certification stage, whether she has claims typical of other class members. It's not uncommon to have class representatives

represent different parts of a case. Sometimes you see that someone who -- in a price-fixing case, someone who is no longer purchasing a price-fixed product doesn't represent an injunction class, just represents the damages class, and vice versa. So it's certainly not an issue for a motion to dismiss.

THE COURT: Imagine a world in which this case goes to trial -- it's a glorious world -- and at the conclusion of that case, though, just imagine hypothetically a jury verdict in favor of the plaintiffs and imagine that there are numerous plaintiffs who can maintain actions against some defendants but not others by virtue of these arbitration provisions. How are the damages assessed among the defendants in that scenario, do you think?

MS. COOLIDGE: Assessed -- so it's joint and several liability against each of the defendants so each of them is liable for one hundred percent of the damages award. So do you mean how they would work it out amongst themselves at the end?

THE COURT: No, that's what I meant, that part. And then is there a restriction on the plaintiffs' participation in the recovery that gets divvied up if one is barred from some portion of the pool because there's an arbitration provision that barred assertion of the claim against one of the defendants?

I mean, my question is, suppose Perdue prevails on this motion and we get 8,000 more motions for 8,000 more plaintiffs

and they're all granted. Does it make any difference in the damages that are rewarded or recovered or received by the plaintiffs if they prevail on every claim?

MS. COOLIDGE: I don't think that it would because each plaintiff is required -- is authorized to get one hundred percent times three of his or her damages and it doesn't matter where those damages are coming from. So I don't know why it would make a difference.

THE COURT: Okay. Otherwise, I thought the arguments were well-developed in the papers. I don't have any other questions for you right now.

MS. COOLIDGE: Thank you, Your Honor.

THE COURT: Thank you.

Mr. Gordon, how do you see that last series of questions I put to Mrs. Coolidge? Does anything in this case change practically unless possibly the class certification and subclasses, if we get that far?

MR. GORDON: I think it depends on how the plaintiffs end up proving their damages. I would expect that the damages might be unique to each of the integrators, that -- let's assume they prove an agreement and they prove that it has some effect. I would expect that the effect might be different for Tyson's group of growers than a Perdue group of growers, that the "but for" world for the conspiracy would be different for them and you would end up with subclasses so that the

damages that any group of growers might achieve would depend on who their integrator was and I think you end up with classes to that effect. So it does tie back to classes.

But the fact that Ms. Butler, and perhaps many others, either agreed to arbitrate and also agreed to waive the right to proceed as a class plaintiff does go to both class cert issues, class construction issues, and damages that they might be able to recover.

THE COURT: It was a short exchange that I had with Ms. Coolidge. Is there anything more that you wish to add in view of that?

MR. GORDON: Not at this time.

THE COURT: All right. Thank you.

(Discussion held off the record)

THE COURT: All right. Thank you, counsel. Why don't we -- why don't we end where we began. I am going to take these motions under advisement. We will issue a written decision and I don't think it will be, I suspect -- though I can't promise this -- it will be in the next several weeks. I think we continue marching while we wait to see how the land eventually settles.

But I think, Ms. Coolidge, you and I talked at the beginning of the hearing about whether we need some amendment. Is there a motion from the plaintiff or do you wish to submit a motion? How do you think we should proceed?

If we were proceeding in Utah, I know what the local rule would require, and that is the filing of a motion for leave to file an amended complaint attaching the proposed amended complaint as an exhibit so that everyone could evaluate it and we'd all be talking about the same thing, and then if there was a specific objection, we'd receive it and we would know what we need to take up before the complaint's lodged. That seems to me a good mechanism for doing this, but I don't know if the local rule here requires something different.

MS. COOLIDGE: We agree that that procedure would make plenty of sense here. Our preference would be to make that motion once the motion to dismiss has been decided so we understand the full scope.

THE COURT: That seems right to me.

Anybody on this side of the courtroom disagree with that? I mean, let's do this one time and let's make sure we're always directing our comments at an operative complaint, if there is one; and if there's not one, then it's a different motion. I think that makes good sense.

I'm going to put our housekeeping burden on all of you to keep track of deadlines instead of me in case I forget to include this in an order. So I think what I'll propose is that a motion, if there is one, any motion for leave to amend the complaint, should be filed within 30 days of the court's disposition of the motions we heard argued today and should

include attached to that motion a copy of the proposed amended complaint. I don't know how best to do this. I don't -- I don't know where we're going to be at that point but I'd be surprised if anybody has anything to hide. I don't expect surprises in the complaint given the bankruptcy issue we're dealing with.

Let me encourage you to consider at least attaching a red-line version or e-mailing one to the defendants or something so everybody can see what's different. It's a long complaint and let's just make it as easy to figure -- in fact, why don't you just attach it to the complaint so I can see it too, if that's agreeable.

All right. What else do we need to take up while we're here today? Anything more, counsel?

MR. CRAMER: I guess, Your Honor, the only other issue is there's a stay of discovery in place. Does Your Honor want to maintain the stay until the motions are decided or do we want to move forward with 26(f) conferences?

THE COURT: I think we should understand what we're dealing with, if we're dealing with anything, before we get into discovery. That's where I was when I decided the motion in the first instance. I really don't think it will be very long, I hope within the next several weeks.

But along that line, let me just anticipate another motion that might be forthcoming. I don't know what the JPML

will do. I don't know -- nor do I control it nor do I care really, but we have this case and so we'll proceed. So once this set of motions is decided, assuming there's a complaint in place and we're moving forward, then we're moving forward. There won't be a stay while we wait on an MDL proceeding irrespective of how these motions are decided.

MR. CRAMER: Fair enough. Thank you.

THE COURT: Thank you. All right. Anything for the defendants, Mr. Harkrider?

MR. HARKRIDER: No. Other than thank you very much.

THE COURT: All right. Counsel, once again, thank you so much for your patience and your argument today and your excellent briefing. We really enjoy our time with all of you. We'll be in recess.

(The proceedings were concluded)

C E R T I F I C A T E

I, Brian P. Neil, a Certified Court Reporter for the Northern District of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in above-captioned case.

I further certify that I am not employed by or related to any party to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 25th day of April 2018.

s/ Brian P. Neil

Brian P. Neil, RMR-CRR
United States Court Reporter